SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 1277

JOSEPH ABRAMS and
RICHLAND SECURITIES, INC.,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated May, 1966

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners apply for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit rendered March 4, 1966 affirming convictions for sale of unregistered Automatic Washer Company stock in violation of the Securities Act of 1933, 15 U.S.C. §§77e(a), 77x, and for conspiracy, 18 U.S.C. §371. The case was tried before TYLER, J. and a jury in the Southern District of New York. It involved what the prosecutor himself characterized as a *"highly technical"* offense (M2265) *and as the Court of Appeals opinion noted "the narrow issue of illegally selling unregistered stock* (App. pp. O-10 *infra*);* *yet the trial lasted five and a half months, although no fraud was charged in the indictment!*

Opinions Below

The opinion of the Court of Appeals pronouncing judgment below (Appendix *infra* pp. O-1 *et seq.*) appears at F. 2d . The opinion of District Judge TYLER rendered on August 14, 1964, denying petitioners the right to participate in proceedings involving the mental capacity of codefendant Albert appears at 35 F.R.D. 529 (Appendix *infra* pp. O-23 *et seq.*); the opinion of the District Judge rendered on February 2, 1965, ultimately determining the issue of defendant Albert's mental capacity is not officially reported (Appendix *infra* pp. O-29, *et seq.*). The opinion denying petitioners' post-verdict motion for a new trial is not officially reported (Appendix *infra* pp. O-37).

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* All emphasis supplied unless otherwise noted.
"M" refers to pages in the transcript of the trial; "PM" to the minutes at pretrial.
"A" refers to petitioners' printed appendix.
"DAR" identifies exhibits of petitioners Abrams and Richland Securities, Inc.
"O" page references to appendix of opinions, *infra*.
"S" page references to statutes and constitutional provisions involved.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Before trial the prosecution interrogated a lawyer and former officer of Automatic who stated that his testimony would favor the defense; he was thereupon enjoined to secrecy. At the trial, the Government aggravated this unconstitutional suppression of evidence by denying the defense access to a deposition of the same official theretofore taken in reorganization proceedings of Automatic.

(a) Louis G. Carmick, a venerable attorney, once Secretary and later Vice-President of Automatic, was interviewed by the prosecution before trial. After having indicated that his testimony would be favorable to the defense, he was enjoined to secrecy. Access to Carmick's deposition, which was refused at trial, would have compelled the defense to call him as a witness. That is graphically demonstrated by Carmick's *post-verdict letters and affidavit* to the trial Court describing himself as "no personal friend of Joe Abrams" and as "the second most informed person pertaining to the affairs of Automatic Washer Company".* Mr. Carmick set forth the *specific factual considerations* upon which he

* Mr. Carmick in his post verdict letter to Judge TYLER on March 14, 1964 stated that "a sense of personal duty" prompted him to write to the Court with respect to the conviction of petitioner Abrams which on the basis of the facts he outlined he felt "resulted in a grave miscarriage of justice"; it would suffice simply to quote the following excerpts:

"Dear Judge Tyler:

I was shocked to read in the newspapers of the conviction of Joseph Abrams for conspiracy in the sale of unregistered stock of

(continued on page 3)

advised the trial Judge, as quoted in the Court of Appeals' opinion, that Abrams was "candid, blunt and completely honest" and that the trial resulted in "a gross miscarriage of justice." His post-verdict letter stated *"I gave and kept a promise not to reveal to the defendants, the questions put to me by the Prosecution staff and my answers"* (A115a-19a).

(b) The ruling of the Court of Appeals that there is "no authority for the proposition advanced by

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Automatic Washer Company. * * * As probably the second most informed person pertaining to the affairs of Automatic Washer Company and our transactions with Albert, his companies, Joseph Abrams and subsequently Bankers Life, I was interviewed a number of times including a voluntary conference of a full day with the U.S. Attorneys in New York. I gave, and kept, a promise not to reveal to the defendants, the questions put to me by the Prosecution staff and my answers. * * * I can say frankly that Mr. Abrams was the only New Yorker among all the interested parties that I dealt with who was candid (often to the point of rudeness) and who honestly gave with full sincerity, a great deal of his time and effort to help Automatic Washer in its difficulties. I can truthfully say that he went out of his way to give Automatic honest advice; he spent his own money for the benefit of Automatic; he gave his time without complaint. These activities included that he helped us to complete our tooling; he tried to merge into Automatic Washer Company the White Front Stores and Carter's Emporium (both of California) as replacements for the N. O. Nelson deal; he tried to protect Mr. Chamberlin, our President, from himself and the Albert group when Chamberlin became erratic. In actual fact, Abrams tried to do more for our company than the most loyal stockholder. As he bluntly stated to me, he did not want us (our company) to be 'taken' by the 'slick group' in New York City.

It is my distinct recollection that because of the N. O. Nelson transaction he (Abrams) completely severed his connections with Sydney Albert and the Bellanca group. In this connection, he several times personally warned me against Albert and his group. At least one of these blunt warnings was in the presence and hearing of some others of the Albert Group. Thus to my own knowledge he actively opposed them. * * * Judge Tyler, this letter is a spontaneous writing from me not as a friend of Joseph Abrams, because we are not friends, but as an officer of the court who feels strongly the need to be heard in the Abrams' case. * * * I feel strongly that it would have been a physical impossibility for Mr. Abrams and Albert to have been conspiring in

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[petitioner] Abrams, that hearsay statements by a third party may be introduced to impeach a witness" and that "the deposition was properly excluded" is completely erroneous. Petitioner's counsel never sought to, nor would introduce *an unexhibited and uninspected deposition* into evidence either to impeach a Government witness or for any purpose. Petitioner's counsel asserted "we have a right to see that deposition for no other reason than to see whether or not it refers to any item, and it need only be a single item which the defense could avail itself of" (M1568-76). There is no authority holding that hearsay may not furnish, as it often does, the most important leads to the production of necessary evidence as well as essential witnesses. Assuming that the Carmick deposition may properly be classified as "hearsay", it was error of constitutional magnitude to suppress even hearsay which the prosecution knew would be helpful to the defense, having enjoined Carmick to secrecy.

(c) When access to the deposition was demanded at the trial, *it was then actually in the courtroom!* It was

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(continued from page 3)

this matter since to my personal knowledge, Abrams was actively opposing (in fact, fighting) Albert and his group.

* * * * *

Most respectfully,
Louis G. Carmick"
(A115a-19a)

The foregoing communication was verified by Mr. Carmick under oath in a subsequent affidavit (July 20, 1964; A161a-4a) in which he stated "Affiant informed Mr. Elsen [Government counsel] that although affiant did not desire to be involved in this case, that based upon personal knowledge of the facts of the Automatic Washer case, if he [Carmick] were to testify he would be testifying *in favor of Abrams*" (A161a); And in a communication of even date addressed to Judge TYLER, Carmick said, "Under the circumstances I am not only willing but strongly desire that I be examined as to my previous letter to you and my affidavit of even date and that Miss Holdridge and Mr. Elsen [Government counsel] be similarly examined at the same time and place" (A166a).

not Government material, but belonged to a reputable law firm holding the Government's receipt, containing the proviso that the deposition was returnable *"upon demand"* (A105a-7a; A115a). This receipt was turned over to petitioners' counsel who were expressly delegated to demand return of the deposition. The refusal of the prosecution to comply with such demand, sustained by rulings below, certainly deprived petitioners of material helpful to the defense, as a lead to calling Carmick as a witness, and for the more effective cross-examination of a chief prosecution witness, Chamberlin.

2. It was a denial of due process to bar petitioners from participating in the proceedings involving the mental capacity of defendant Albert whose queer behavior during trial manifested the mental aberrations that necessitated a formal judicial inquiry.

(a) The refusal to grant a severance as to these petitioners sought specifically upon the ground of defendant Albert's misbehavior was likewise a denial of due process (M7502, 7551), especially since petitioners sought to waive a jury but stipulated to have all of the issues *simultaneously tried* but determined as to petitioners by the Court alone.

3. Petitioner Abrams acquired immunity under the provisions of 15 U.S.C. §77v(c) as a result of testimony given in July, 1957 before the Securities and Exchange Commission, under compulsion of subpoena served upon him after he had asserted his constitutional privilege against being compelled to testify.

4. Assuming *arguendo* that after directing an acquittal of these petitioners on Count 1 of the Indictment as barred

by the statute of limitations, the trial Court was justified in denying dismissal of Counts 2, 11, 17, 19, 20, 21 and the Conspiracy Count 104 upon the same ground, it was a denial of due process to refuse petitioners' request to submit that specific defense to the jury for their determination.

5. Petitioners were deprived of a fair trial because of grave error committed by the trial Court in respect of the instructions to the Jury and rulings made during the trial.

(a) The trial Court in effect directed a verdict by giving abridged post-charge instructions to the Jury of "four essential elements which the Government must prove" that completely omitted any reference to criminal intent and other exculpatory elements which the triers of the facts were required to consider in connection with this admittedly "highly technical" offense under a statute phrased as the trial Judge acknowledged, in "gobbledygook" (M10088), and

(b) By charging the jury that the defendant was presumed to know the law and accordingly it was "not necessary for the Government to establish" that defendant "knew he was breaking a specific law or any particular rule" (A314a), and this with respect to a "highly technical" offense which the trial judge recognized was prosecuted under "a difficult statute to make comprehensible" even "for lawyers as well as laymen" (M10554). The net effect of these rulings was to charge the jury that petitioners were presumed to be more knowledgeable as to the vagaries of these statutory requirements that so baffled the experts, than lawyers, financial authorities and indeed the Court itself.

(c) The error was aggravated by the refusal to charge that the difficulties in interpreting this statute, criticized by the Court below in another case as being "far from a model of clarity", may be taken into account in the jury's consideration of the intent with which the sales here involved were made (A569a).

(d) The pattern of error was completed in the Court's refusal to charge that a defendant who sells unregistered stock *at a time when he had a legal right to do so* is guilty of no crime, notwithstanding that at the time of acquisition thereof it was illegal to do so or that it was the defendant's *then intent* to commit an act in violation of law; *intent to commit an unlawful act which at the time of its commission is legal, is neither a crime nor punishable as such* (A104a-105a).

(e) It was error to exclude the official report of the Midwest Stock Exchange which was of controlling importance on the issue of petitioners' innocence (A85a-94a); the Court of Appeals erred in sustaining the exclusion of the report on the ground that petitioner Abrams "had the burden of showing that the document qualified under 28 U.S.C. §1732, the statutory business record exception" (App. pp. O-11, O-12), the trial Court having expressly ruled "Of course, that is kept in the regular course of business" (M9268-9), after the Government counsel had stipulated "Your Honor, we will agree to the authenticity of the Midwest Stock Exchange documents" (M8830).

(f) It was error to instruct the jury with respect to the 103 substantive counts that "each count charges the commission of a separate crime" and "each count * * * charges violations of or conspiracy to violate

the Securities Act of 1933" (A300a, A301a); all substantive counts should have been consolidated into a single count or, in the alternative, the Government should have been required to elect one count on which to prosecute (A73a).

(g) It was clear misconstruction of the Securities Act and grave error to charge the jury that an underwriter under the statute "is simply anyone who buys stock from the issuer of the stock and sells it to the public, or anyone who assists an issuer, or another underwriter, in selling stock to the public" (A108a).

(h) Petitioners were denied a fair trial by the Court's failure to give the jury proper instructions as to the crucial date of May 8, 1956 when Bankers Life obtained exclusive control of Automatic, after which petitioners admittedly were in nowise involved in the company's internal affairs; the erroneous rulings were not limited in their impact to the vital issue of control but were equally important on the issue of conspiracy as well as on the defense of change of circumstances.

6. It was a denial of due process and of a fair trial to permit the Government over repeated objection to introduce an inordinate mass of proof of collateral transactions as alleged background, and ostensibly to establish motive and intent, since neither the indictment nor the bill of particulars alleged fraud nor gave notice that petitioners would be required to meet and treat with innumerable and divers transactions of great complexity occurring over an extended period of years long prior to trial (A97a, 98a, 111a); the indictment and bill of particulars admittedly confronted petitioners with defending a "highly technical" offense presenting, as the Court of Appeals noted below, "the narrow issue of illegally selling unregistered stock".

(a) The trial Court's refusal to strike the testimony of Gabriele Gurland, an indefensible, perjurious Government witness, misled the Court of Appeals into concluding that a fictitious trading account was set up by petitioners in her name and "that she knew nothing about the account"; since the record established beyond dispute that her testimony in that respect was false, *as was admitted by the prosecution, it must be presumed that the jury likewise was deceived.*

7. Petitioners were denied a fair trial in that Government counsel over repeated protest were permitted to examine witnesses giving favorable testimony for the defense in a fashion designed to indicate that such witnesses in *private conferences* made contrary statements to the prosecuting attorneys. Such tactics, uniformly condemned by judicial authority, enabled prosecuting counsel to make themselves unsworn witnesses for the Government and to support this prosecution by their own asserted but untested veracity (A109a).

Statement of the Case

The indictment filed April 3, 1961 in 103 counts charged that defendants "caused to be carried through the mails" certificates of unregistered Automatic Washer Company ("Automatic") stock "for the purpose of sale and for delivery after sale" in violation of 15 U.S.C.A. §§ 77e(a) (1), (2) and 77x. Count 104 was the conventional conspiracy count (A1a, 44a-59a).

Following pre-trial conferences, 28 counts were severed as to these petitioners and ultimately dismissed (M57-59; A12a, 289a); of the remaining 22 substantive counts, the trial Court directed an acquittal on count 1 as to petitioners Joseph Abrams ("Abrams") and Richland Securities, Inc. *a real estate company* (A522a, 569a) ("Richland"); the jury acquitted petitioners on counts 12, 13, 14, 15 and 16; they were convicted on counts 2, 11, 17-25, also 55-57, 75, 79, and the conspiracy count 104 (A24a, 26a, 495a-7a).* Abrams was sentenced to and is serving a term of five (5) years on all counts to be served concurrently; Richland was fined $5,000 on count 2 (A28a).

Novel legal questions are presented which indeed the trial Court acknowledged merited review. *No fraud, no boiler room operations, no market rigging was charged.*

In sentencing petitioners, Judge TYLER observed:

> "[T]here are many facets of this case—and I don't mind the government knowing it, and Mr. Armstrong

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* Defendant Knohl was tried and acquitted on all counts submitted to the jury; defendant Albert was convicted on all counts submitted to the jury (A496a-7a; M12207-8). The indictment against defendant Gordon was severed (A12a; PM 12150-1) and all counts ultimately dismissed against him A289a); defendant Shindler died before trial.

> [government counsel] has heard me say this. There are a lot of reasons why there are some novel legal problems involved here, and *I certainly hope and trust that an appeal will be taken because there were these problems,* * * * " (A28a).

No boiler room operations or fraudulent devices were either claimed or proven. The Court in charging the jury stated: "I emphasize here, that there is no fraud count here in this case" (A317a)*:

> "I instruct you that none of these defendants is charged in this indictment with any offense of manipulating or rigging stock prices of Automatic Washer or any other stock" (A317a).

Although the conspiracy count charged that it "was part of said conspiracy" to "sell a security, to wit, common stock of Automatic Washer Company, through the use and medium of a prospectus and otherwise, no registration statement as to said security being in effect", there were no accusations of fraud therein made nor was there any fraud or misrepresentation charged in the specified overt acts (A57a).

Unchallenged facts concerning Automatic Washer Company, in the light of which the questions here presented must be considered.

Automatic, starting as a partnership in 1908 and incorporated in 1928, produced the first electrically operated agitator type washing machine. Throughout the company's existence, it engaged in manufacturing a commercial washer and dryer. Its stock was listed long ago on the Midwest Stock Exchange, a national exchange equivalent to the New York and American Stock Exchanges (M108, 131, 1180-1). The stock issued and outstanding on December

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* Earlier in the trial, the Court observed: "I agree there is no fraud count here" (M7676-7); the Court reiterated: "Forget all about fraud. Fraud really isn't in the case, Mr. Gottlieb, you and I agree" (M7760-1; 10142-3).

13, 1955 amounted to 291,294 shares (Exh. DAR-A-E5; M1501-2); *all were unregistered* having been issued prior to enactment of the Securities Act of 1933.

John W. Chamberlin, a Government witness, became president of Automatic on March 22, 1955 (M929-31). He had developed "the first automatic washer and first automatic dryer and patented them" and "worked for the Bendix Corporation" after he had licensed these patents to the company, which thereafter sold the well-known Bendix washer (M932, 1154). He had broad experience in the field and spent from 1950 developing a radically new type of washer and dryer and a new type of commercial coin-operated washing machine in his own company, then known as Washer Dryer Company (M932-3, 1156-7). The sums spent in research and development of this project were well in excess of a half million dollars (M1156).

According to Chamberlin, his company thereafter sought to have Automatic manufacture the washing machines "on contract for us" but was unable to do so (M933, 1157). A successful proxy fight was later begun by a group in Automatic headed by one Charles King who invited Chamberlin "to become temporary president" (M933, 1158-60). Chamberlin who had prior financial experience, checked into the company's affairs and found that it sorely needed working capital (M940-4, 951, 1160-71, 1211-17, 1227-8, 1231-2, 1773).

Efforts were promptly made to obtain financing, the need for which proved even greater after Chamberlin's discovery of derelictions on the part of prior management (M941-3). He consulted Van Alstyne Noel & Company, investment bankers in New York City (M943) and conducted "between 25 and 30 different sets of negotiations" (M1773) during the period "of approximately March 1955 until approximately the middle of November 1955" (M942). The investment bankers "required complete engineering reports and recommended the Trundle Engineering Com-

pany of Cleveland, Ohio" (M944), admittedly "highly competent"; it employed "all type of engineers and all types of accountants and managements consultants" and was "retained by various companies and investment houses all over the world to make detailed investigations from a financial and engineering standpoint" (M1236-7). Trundle "sent their engineers and financial people to investigate" and thereafter filed a detailed and costly report paid for by Van Alstyne Noel (M944, 1238). The Trundle report indicated that the company had a good potential (M1555-8). Chamberlin testified that Automatic had 20 million dollars in backlog orders (M1556-8). Van Alstyne Noel was to raise "approximately $800,000", which, according to Chamberlin, was "to be conditional upon the two companies [Automatic and Washer Dryer] being merged and it was to be raised by them, but not in any public forum" (M944-5).

The contract for the proposed financing, drawn by Francis Purcell, then attorney for Van Alstyne Noel, was approved by all parties. Closing was set for the morning of President Eisenhower's heart attack (M1212), but the deal collapsed because of Van Alstyne's refusal to sign the contract due to the adverse market conditions occasioned by the President's sudden illness (M1213). Francis Purcell, attorney for Van Alstyne, subsequently a defense witness for these petitioners (M9271), had been Regional Administrator of the New York Office of the Securities and Exchange Commission from November, 1953 until July, 1955 (M9273).

After that attempted financing collapsed, the needed capital was obtained through petitioner Abrams, who acted as finder. The financing was arranged with defendant Albert, then a very wealthy businessman of diverse interests (M103, 1537D-E, 3486). Chamberlin testified "We were successful in obtaining $800,000" (M1218-9). Actually the financing amounted to $841,500, the last payment of which was made

in February, 1956 (M1227-8, 1294, 1554). The finder's fee was discussed prior to December 8, 1955 and was fixed at 50,000 shares of Automatic stock (M1000-1), which Chamberlin testified *"was a fair and reasonable price"* (M1002). The 50,000 shares were to come from the unissued authorized capital stock of Automatic (M1002). Automatic was then governed by a completely independent board of directors, fully informed about, and who approved this financing (M1162-72, 1205-10, 1227-8, 1804-8).

The financing was consummated by an agreement (December 8, 1955) between Automatic and Pierce Governor Corporation ("Pierce") for the purchase by the latter of 330,000 shares of Automatic common at $2.55 per share, "representing the market price as of the date of the contract less 15%" (M956-7; Gov. Exhs. 3-2; 1294-5; Exh. DAR-CU-1; A622a-3a).* Pierce was (and still is) a *sound company* listed on the American Stock Exchange, with which defendant Albert became connected in October or November, 1955 (M3864-5, 6948, 6915, 6918, 6964-71).** Albert resigned from Pierce on June 14, 1956 and before that date divested himself of his controlling interest in the company (M6955-6, 9891). Pierce had until May 1, 1956 to complete

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* The certified public accountant's annual report of Automatic for 1955 dated May 10, 1956, specified that: "(16) CAPITAL STOCK Under date of December 8, 1955 an agreement was entered into between Pierce Governor Corporation and AUTOMATIC WASHER COMPANY for the purchase by Pierce Governor Corporation of 330,000 shares of AUTOMATIC WASHER common stock at $2.55 per share representing the market price as of the date of the contract less 15%. The 330,000 shares *were actually purchased and paid for* on the following dates: 54,901 shares purchased prior to December 31, 1955, paid prior to December 31, 1955. 62,746 shares purchased prior to December 31, 1955, paid in January 1956. 212,353 shares purchased after December 31, 1955, paid in February 1956." (Exh. DAR-CU; A622a-3a).

** Leland E. Borin, president of Pierce Governor and a Government witness, testified that the company's net sales for 1955 were $3,766,832; for 1956 its net sales were $8,757,051 and for 1957, $9,851,850. In 1956 it had spent in excess of $400,000 for capital improvements; in 1957, $369,000 for capital improvements and in that year reduced its bank indebtedness by some $400,000 (M6965-71; Exh. DAR-AT).

the purchase (Gov. Exh. 3-2, par. 1, p. 2). The Pierce Governor deal affording Automatic its sorely needed funds was negotiated at arm's length (M967-8, 1309). The 330,000 share block of Automatic stock issued in connection with this financing was listed on Midwest Stock Exchange; *complete financial statements were attached to the listing application and every phase of the transaction was disclosed* (M1300). Abrams' finder's fee of 50,000 shares of Automatic was thus fully earned and Mr. Chamberlin, Government witness, so acknowledged (M1219-20, 1472-5, 1530-2); indeed when he so advised Government counsel, their response was that they themselves already knew it (M1221)! The finder's fee of 50,000 shares of Automatic was waived by Abrams in consideration of a transaction involving rubber machinery made by petitioners with defendant Albert, at which time the block of 50,000 shares was actually issued (M1421-3, 1435-6, 1470-1).*

Out of the 330,000 shares that figured in the Pierce deal already described, petitioners themselves acquired a second block of 50,000 shares for which actual cash was paid of $2.55 per share, a total sum of $127,500; this was done in order to facilitate the necessary financing (M1799-1801).** Thus there were two 50,000 share blocks of Automatic acquired by petitioners, one from the finder's fee

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* Suffice it to note the following observations made by the Trial Court: "Let us assume we are to stop right here. I assume that the trier of the facts could have listened to every nuance of what has gone on so far, and what you are talking about, the Chamberlin testimony on cross and on direct, *and conclude very, very properly if they want to interpret the facts in such a way that this was a bona fide business deal*" (M1532).

** Chamberlin testified: "Q. And in order to induce Richland to make that cash available didn't you make the statement, 'Look, we have got a commitment—didn't you say this in words and substance—and we got to have the money. So Richland Securities came up with the cash and took Pierce Governor's commitment to that extent of that 50,000 shares.' Isn't that the way it happened? A. Yes, sir. * * * Q. Well, did you tell Mr. Abrams that you appreciated the help that he gave you in order to ease the financial situation? Mr. Elsen: Objection. The Court: Did you say anything to Mr. Abrams about his efforts? The Witness: I thanked him very much." (M1799-1800)

arrangement supplanted by the rubber machinery transaction, turned over to petitioners in February, 1956, and the other block by cash purchase at $2.55 per share acquired in January, 1956 (M1002, 7867, 8227, 8276-84; Exh. DAR-CU-1; A622a-3a).

The substantive counts against these petitioners were predicated upon subsequent sales of shares from these two blocks.

On May 8, 1956, Bankers Life & Casualty Company, a company completely independent of these petitioners, obtained and thereafter continued in control of Automatic throughout the crucial period involved in this indictment.

Bankers Life & Casualty Company ("Bankers Life") was a very substantial corporation with millions of dollars of assets (M6871-2). The Company was "in the life and health and accident insurance business" and "owned manufacturing plants, hotels, restaurants, real estate, construction companies, over 300 companies" (M1412). Its main stockholder was John McArthur (M6797).

Defendant Albert (through Bellanca in which he was a major shareholder) actually came into control of Automatic in April 1956 (M1045, 1391-2, 9554-71; Gov. Exhs. 3-12/13). The advent of Bankers Life *into control of Automatic, only about one month later* (M1543-4, 1781), is of vital significance.

Bankers Life was introduced into this record by the prosecution (M1065-7). On May 8, 1956, Bankers Life agreed to purchase a controlling interest in Automatic (Gov. Exh. 3-14); to quote the prosecution, under it "Albert agrees to sell one million and some odd shares of Automatic Washer stock to Bankers Life" (M1067). Indeed, on May 7, 1956 or some days prior thereto, according to Chamberlin, he was informed by Albert that the latter "was negotiating with Bankers Life & Casualty to sell them his stock of Bellanca or both, a controlling interest specifically he said in Automatic" (M1077, 1543-4).

The prosecution developed that Chamberlin continued with Automatic and regarded Mr. McArthur rather than Albert as his employer from May 8, 1956 (M1080, 1543-4). Chamberlin never met Albert again after May 8, 1956, nor did he attempt to get in touch with him (M1781).

Chamberlin did not commit himself immediately to remaining with the company. He said, "I would decide after I met the people" (M1411), and "I wouldn't work for them *until I met the boss*" (M1413). He did meet Mr. McArthur's business asociates in Chicago on May 7, 1956 (M1411-3), thereafter went to the Coast to meet the "boss", spent three days with him and then told McArthur he was going to stay (M1413-13a). Thereafter, Chamberlin testified, "I reported to Mr. McArthur of Bankers", his boss (M1408-10). Automatic's shortage of working capital was promptly taken up by Chamberlin with McArthur and every aspect of the company's needs explained (M1794-5). Bankers Life had arranged to advance $2,200,000 to the corporate complex as it then existed (M6746-50).

Under the agreement of May 8, 1956, Bankers Life undertook to buy 1,112,500 shares of Automatic stock at $8 per share (M1836-40). *The contract specified*:

> *"The transfer of all shares set forth in this agreement shall be considered as having been made on May 8, 1956."* (Gov. Exh. 3-14, par. 13; M1838-9).

Chamberlin himself at that time was offered $12 a share by Albert for his stock which he refused to accept (M1818-20)! * *More important, no such offer was made to petitioners who were in no way connected with these transac-*

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* Chamberlin on cross testified: "Q. Did you tell Mr. Elsen [government counsel] why you were unwilling to sell that stock at $12 a share? A. Yes, sir. Q. Did you tell Mr. Elsen that you were unwilling to sell your stock at $12 a share because you wanted to bring your project with the experimental models to a successful completion and you did not want to give up a business that you had put years of time and a great deal of effort into, is that what you told Mr. Elsen? A. Exactly what I told him." (M1820)

tions nor with Bankers Life after it came into control of Automatic on May 8, 1956.

> "Q. Did Mr. MacArthur or anybody at Bankers Life tell you that Mr. Abrams had any say in the management of the affairs of the company after they got in? A. No, sir." (M1414-15)

Thus after May 8, 1956, control of Automatic no longer was in Albert but in Bankers Life, with whom these petitioners had no connection whatever. Indeed, by then, petitioner Abrams and defendant Albert were in hostile disagreement, *that had erupted and already reached a violent climax early in March of 1956* (M1395-8; 1377-92, 1395-1402; Gov. Exhs. 3-13; 2766-9, 2782-93, Gov. Exhs. 5-Q-1, 5-Q-2, A123a-130a). The shift in control of Automatic from the Albert corporate complex to Bankers Life at a time when Albert and Abrams were in bitter dispute is of controlling significance on the questions of suppression of evidence, conspiracy and criminal intent.

Important is the direct impact of decisions in litigations involving Bankers Life and relating to the very transactions introduced into evidence by the prosecution *specifically called to the trial Court's attention** (M7875-80). Bankers Life sued Bellanca Corporation, "seeking declaratory judgment as to the ownership of 500,000 shares of common stock of Automatic" (*Bankers Life* v. *Bellanca Corp.*, 7 Cir., 288 F. 2d 784, 785 [1961]). Bellanca, by counterclaim sought "recovery of $4,000,000.00 from Bankers for 50,000 shares of Automatic it delivered to Bankers". The Court noted that the agreement (Gov. Exhs. 3-14; M1079) "states that Bellanca 'hereby sells' and Bankers 'hereby purchases' 1,112,500 shares of the common stock of Automatic for a total purchase price of $8,900,000.00 or $8.00 per share"

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* Judicial notice may be taken thereof: *Nahtel Corp.* v. *West Virginia P. & P. Co.*, 2 Cir., 141 F. 2d 1, 2 (1944); *Rader* v. *Manufacturers Cas. Ins. Co.*, 2 Cir., 255 F. 2d 404 (1958); *Alexander* v. *Hillman*, 296 U.S. 222, 231 (1935); *Fletcher* v. *Evening Star Newspaper Co.*, 133 F. 2d 395 (D.C. 1942).

(p. 786), and further that Bellanca contracted "to deliver or cause Automatic to deliver an additional amount so that Bankers will own not less than 51% of the issued and outstanding shares of Automatic" (786). 500,000 shares were delivered on execution; 612,500 shares were to be delivered within 90 days. It is further indicated that "[t]he market value on the date of delivery, May 10, 1956, was $6.75 per share" (p. 789, n. 5). The Court held:

> "Bankers' election to retain the 500,000 shares of stock delivered obligated it to pay for the same. Its self-serving characterization of the 500,000 shares as an 'earnest deposit' is wholly without foundation either under the terms of the contract or the evidence in the record (p. 789) * * * On the record before it the District Court was justified in concluding that Bankers' refusal to pay for the shares it elected to retain was both unreasonable and vexatious." (p. 790).

The District Court had "found the reasonable value of Automatic on the date of Bankers' election to retain it, August 8, 1956, to be $2.50 per share—*the lowest market value on that date*" (p. 789), and for reasons that the opinion clearly depicts, the unanimous Court held that "the District Court did not err in measuring the recovery by such market value on the date of Bankers' election" (p. 789). The recovery by Bellanca on its counterclaim, unanimously affirmed, amounted to $1,250,000. with interest from August 8, 1956 at 5% per annum (pp. 786, 790).

Petitioners were in no wise involved in these transactions, occurring when and after control of Automatic passed from Bellanca, Albert's company, to Bankers Life. We emphasize that Albert offered Chamberlin $12 a share at that time for his Automatic stock, which he refused to accept (M1818-20). Although Albert apparently needed the additional shares, no offer to purchase any of petitioners' shares was made by Albert, because by that time they were in hostile relationship (M1377-92, 1395-1400, 2766-9, 2882-93, A123a-130a, Gov. Exhs. 5-Q-1, 5-Q-2).

Bankers Life never did nor could challenge that it remained the dominant stockholder of Automatic after it obtained control on May 8, 1956, until Automatic was placed in reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C.A., § 501 et seq. many months later.* The petition for reorganization was filed and C. M. Kirtley was appointed trustee on November 2, 1956 (*Kirtley* v. *Abrams*, 2 Cir., 299 F. 2d 341). Kirtley as trustee sued Bankers Life in 1961 charging "that Bankers was attempting to work a scheme whereby Bankers, through its subsidiary, Illamex, Inc., would acquire 492,500 shares of Automatic stock, purportedly worth no less than $1,267,500, for a cost to Bankers of only $250,000" (*Kirtley* v. *Bankers Life*, 198 F. Supp. 30, 31; affd. 8 Cir., 307 F. 2d 418 [1961]). The jury returned a verdict for $1,056,250, of which $406,250 was for compensatory damages and $650,000 for exemplary damages (198 F. Supp. at p. 31). Automatic claimed that Bankers Life "caused Automatic to give the Bellanca stock, allegedly worth $500,000 for the Schuster note and mortgage, allegedly worth only $65,000" (*id.*). At the request of Bankers Life, the specific interrogatory was submitted to the jury: "Did Bankers Life and Casualty Company, on or about May 11, 1956, *cause Automatic Washer Company to acquire* from Martin Development Corporation a written note and mortgage in the amount of $225,000, in exchange for 25,000 shares of Bellanca stock?" and "[t]he jury answered the interrogatory in the affirmative" (id. at p. 32).

Bankers Life was thus certainly in complete control of Automatic as early as May 11, 1956.

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* Arthur K. Rothschild, treasurer of Bellanca testified: "Q. You testified, Mr. Rothschild, that on May 8th you gave or you delivered resignations of all the then board except Mr. Chamberlin to the Bankers Life; do you recall that? A. On May 10th, yes, sir. Q. Thereafter you had no further connection with the management of that company, did you? A. No, sir." (M9955)

The Court of Appeals unanimously sustained the propriety of the award of compensatory damages, but was divided on the issue of exemplary damages (307 F. 2d at pp. 426-27). Thus there was no question of the wrongdoing of Bankers Life *"after becoming the dominant stockholder of Automatic in May of 1956"* (307 F. 2d at p. 420). The majority, considering the question of the award of exemplary damages, notes that "Automatic argues (p. 425) that the wealth of the defendant [Bankers Life] justifies the amount of the exemplary damage award" and that "[t]here is respectable authority to the effect that the wealth of the defendant is a factor to be considered in an award of exemplary damages". The majority, however for reasons not pertinent here, held the award of punitive damages excessive and directed "a new trial upon all of the issues, including the exemplary damage issue" unless plaintiff "elects to file a remittitur of all exemplary damages" (p. 426). The partial dissent stated: "There is every inference that Bankers is of such financial stature as to force the conclusion that only a large amount would satisfy the requirements of punishment and deterrence" (p. 427, n.1), and that "not long thereafter, Automatic was forced into bankruptcy" (p. 427, n.2).

ARGUMENT

This prosecution for an admittedly "highly technical" offense, predicated upon a statute phrased, as the trial Court aptly acknowledged, in "gobbledygook", presents novel legal problems of constitutional magnitude and of transcendent importance in the administration of justice.

1. *Suppression of evidence.* After conviction, petitioners' counsel received a copy of the letter addressed to the trial Judge by Louis G. Carmick, Chicago lawyer who had been "secretary and later vice-president of Automatic" (A115a). His letter (quoted *in extenso;* pp. 2-4, *supra*)

referred to a *private conference with Government counsel* in which he indicated that if called as a witness, his testimony would be favorable to the defense; he was thereupon enjoined to secrecy (A115a-16a, A161a). His communications, buttressed by his sworn affidavit (as already noted; pp. 2-5, *supra*), in specific factual detail set forth the basis upon which this attorney, a knowledgeable officer of Automatic, protested that the conviction here sought to be reviewed "resulted in a gross miscarriage of justice" (A115a-19a, A171a-66a). Mr. Carmick asserted that his communication was "a spontaneous writing from me not as a friend of Joseph Abrams, because we are not friends, *but as an officer of the court who feels strongly the need to be heard in the Abrams case*" (A118a). He emphasized in the light of the facts (specifically delineated, pp. 2-4, *supra*) that "*it would have been a physical impossibility for Mr. Abrams and Albert to have been conspiring in this matter since to my personal knowledge, Abrams was actively opposing (in fact fighting) Albert and his group*" (A118a). Mr. Carmick volunteered to come to New York *at his own expense* and present himself to the Court personally for questioning (A119a, A166a).

The foregoing becomes more startling and compelling in view of what occurred during trial. Chamberlin, an important Government witness, on direct testified to transactions specifically involving Mr. Carmick (M10500-1, 1434-6, 1793). During Chamberlin's cross, petitioners' counsel asked the prosecution to produce "the deposition of Louis G. Carmick under Section 167 of the Bankruptcy Act dated May 10, 1957" (M1133). The Court refused to direct the Government to make the deposition available (M1137-8).

The Carmick deposition was not Government property; it belonged to a reputable law firm, which had loaned it to the Government (M1136-49; Exh. DAR-U). After service of a subpoena by the defense upon that law firm, Mr. Kissel,

a member of the firm, advised counsel that the deposition was in possession of Government counsel, and it was undisputed "[t]hat Mr. Kissel wants me [Mr. Gottlieb] to have it" (M1136). Since the *Government receipt given by Mr. Kissel to Mr. Gottlieb* expressly noted that *"it is returnable on demand"* Mr. Gottlieb properly inquired of Judge TYLER: *"What right has anybody to refuse me access?"* (M1136). Mr. Kissel, who had the right to demand its immediate return, thus expressly delegated defense counsel to take possession thereof. Government counsel did not specify any immediate need for the transcript nor claim that it could not be readily made available; it was in fact available* (M1141-6).

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* The record shows: "MR. GOTTLIEB: Then would your Honor be good enough to mark this photostat of the government receipt signed by Miss Holdridge, and I am going to serve a subpoena duces tecum on government counsel. THE COURT: Mr. Gottlieb, I see no reason why you can't see this deposition. MR. GOTTLIEB: He doesn't want to show it to me. THE COURT: He doesn't want you to use it as cross-examination material. MR. GOTTLIEB: I would not ask him whether Carmick testified to a conversation with him. I know enough about procedure, but I will ask him, 'Did you ever have a talk with Mr. Carmick in which he said so-and-so to you, go and get that machinery'? Let him say that no such thing took place. That is what I want him to do. You think I am not entitled to ask him that? I don't understand what value cross-examination can have then. MR. ELSEN: Cross-examination of Carmick? MR. GOTTLIEB: I am referring to the cross-examination of Mr. Chamberlin. Horvath said he had conversations with Chamberlin; in the Kirtley case there are half a dozen different witnesses who testified to conversations with Chamberlin. I mean to cross-examine as to every one of those conversations and I prepared for that by reading that voluminous record, and I want to read every scrap of testimony that I can find that indicates any transaction which he would have knowledge of. So you know what my purpose is." (M1140-41) * * * "MR. GOTTLIEB: What are we going to get with respect to Mr. Carmick, which is of immediate importance? THE COURT: Like all good lawyers, you are persistent. MR. GOTTLIEB: I forgot. You have the big batch of depositions before you." (M1146)

Request for the depositions was later renewed:

"MR. GOTTLIEB: I would like to renew my request for Carmick's deposition before this witness leaves the stand. THE COURT: No, I feel fortified that my original ruling was sound and fair, because you have gotten into the Carmick business ad nauseum. We are not litigating upon cross-examination of a witness named

Chamberlin some statements that Carmick might have said under oath which are contrary." (M1568) * * * "MR. GOTTLIEB: I say we have an absolute right, irrespective of any rule that has been so far discussed in this case, a deposition given in a prior civil proceeding is the personal or private property of nobody. It is a public record which anybody to this prosecution has a right to have access to, and even if they have no connection with it, it could be by order, subpoena or other means made accessible to anybody in the world who has a legitimate need for it. *I say that we have a right to see that deposition if we sought it for no other reason than to see whether or not it refers to any item, and it need only be a single item, which the defense could avail itself of.* I would like to have it now while one of their material witnesses is on the stand. Because if the deposition [still] lodged in the hands of the lawyer who made it available to the district attorney, I could get it by mere telephone call. My simple proposition is that because the district attorney has been given the courtesy or has been vigilant or outdistanced us in getting it in advance, I know of no authority that gives him the right to withhold it from us at any time or for whatever reason." (M1569-70) * * * "MR. GOTTLIEB: To make my argument clear, I do not claim that any questions I have asked Mr. Chamberlin with respect to Carmick, [or] because I asked some questions or a number of questions or if I devoted my entire examination to Carmick, I am entitled to see the deposition. I claim if I didn't ask Mr. Chamberlin a single question that involved Carmick, I have a right to look at that deposition." (M1571) * * * "MR. ELSEN: *We have a deposition by Mr. Carmick, that's right.* I submit under Mr. Gottlieb's rule, which not only disposes of the limitations under the Jencks Act but goes well beyond what your Honor has ruled, under his rule anything in the government's files could be turned over. MR. GOTTLIEB: That is not my position. I don't claim it is my position. It does not even remotely state my position. *May we have the record show whether that deposition was given in a public litigated proceeding?* THE COURT: *I will assume it was.* MR. ELSEN: *It was, yes."* (M1574-75). * * * "THE COURT: Is Carmick alive? MR. GOTTLIEB: I don't know anything about Carmick, whether he is alive or dead. MR. ELSEN: You know perfectly well that you talked to Mr. Carmick about testifying, at least Abrams has. MR. GOTTLIEB: I never talked to Carmick in my life and never saw him. I don't care if he is alive or dead. Even if I did speak to him, which I didn't, I am not interested in Mr. Carmick. *I am interested in his deposition for purposes of this present witness and this trial.* I don't care anything about whether he is alive or dead. THE COURT: Your legal argument, if that is what you are attempting to advance, does not convince me one iota, because I don't think you can find a case to support your proposition in this circuit. MR. GOTTLIEB: *I don't think they can find a case against me. I represent to the Court, I don't think the most diligent research will find any parallel to what I believe is tantamount, and I don't say its disparagingly, I regard this as one of the most flagrant suppression of proof that results from a ruling of this kind."* (M1575-76)

It was for Mr. Kissel to say who should have the deposition. The Government's own receipt acknowledged his right to demand its immediate return. Unless the Government had an immediate use for the transcript, which was not the case, Government counsel could not rightfully retain the deposition and proscribe petitioners' use of it.

It was for petitioners to determine and it was their exclusive right to ascertain what beneficial material was available in the deposition.* Carmick's post-verdict letters and his affidavit (pp. 2-5, *supra*) serve to point up why the prosecution so zealously withheld the deposition from the defense. Once Chamberlin as a Government witness returned to Honolulu it was not feasible to bring him back. More important, failure to have called Carmick as a defense witness is manifestly no answer to petitioners' contention. Even assuming that we could possibly know that Government counsel had already interviewed Carmick at length and enjoined him to secrecy, *the deposition would have suggested, indeed compelled that he be brought in as a trial witness. Jencks* v. *United States,* 353 U.S. 657 makes it clear that the trial Court may not conjecture as to what use defense counsel might make of the withheld transcript because the trial Judge cannot know what further leads it may supply, or what it may supplement, or whether it will enable defense counsel to place "emphasis

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* In *U.S.* v. *Greater Blouse, etc. Contractors' Ass'n,* 177 F. Supp. 213 (1959), Judge DIMOCK effectively answers the Government's contention made here as follows: "The Government has offered 'to produce all documents which it may use in the trial of this case' and argues that this is the maximum to which defendants are entitled. This argument, however, overlooks the fact that Rule 16 grants production and inspection of documents *not merely to help a defendant understand the prosecution's case but to help the defendant in the preparation of his defense.* * * * *I also reject the Government's argument that much of the material 'could be of no practical value to the defendants in the preparation of their defense.' Such a value judgment is one that should be made not by the prosecution but by the defendants alone.*" (pp. 224-225)

upon the same facts [adduced by the prosecution] even in a different order of treatment" (*Jencks, supra*, p. 1111).

The ruling of the Court of Appeals that there is "no authority for the proposition advanced by [petitioner] Abrams that hearsay statements by a third party may be introduced to impeach a witness" and accordingly "the deposition was properly excluded" (App. p. O-12, *infra*) ignores what occurred at the trial. Defense counsel never sought to, nor would introduce *a non-exhibited and uninspected deposition* into evidence either to impeach a Government witness, or for any purpose. Petitioners' counsel stated his position to be "We have a right to see that deposition for no other reason than to see whether or not it refers to any item, and it need only be a single item which the defense could avail itself of" (M1568-76). Hearsay may furnish, as it often does, the most important leads to the production of necessary evidence as well as essential witnesses.

U.S. v. *Wilkins*, 326 F. 2d 135 (2 Cir. 1964), makes it clear that the constitutional point here presented is available "irrespective of the good or bad faith of the prosecution", a phrase taken from *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). We therefore properly refused to succumb to the strategy adopted below that the professional integrity and ethics of Government counsel were being assailed. We assume as we did below, the prosecution's good faith, albeit misguided and misdirected. In *Wilkins, supra*, MARSHALL *J.* emphasizes that "non-disclosure" of evidence favorable to an accused is not only "a violation of the due process clause" but also constitutes "grounds for collateral attack on criminal convictions" (p. 139). Judge HAYS in a concurring opinion although observing that the Court "should be careful not to exceed the limits established by the Supreme Court" nonetheless recognizes that "failure to reveal the existence" of evidence "vital to the defense"

can be considered "*the equivalent of suppression*" (p. 141). None of these factors turns upon the prosecutor's good faith; that is because Government counsel "carries a double burden". Of course "[h]e owes an obligation to the government" but "[h]e is the representative of a Government dedicated to fairness and equal justice to all" and accordingly "[*h*]*e owes a heavy obligation to the accused*" (*Washington* v. *U.S.*, 327 F. 2d 793, 795 [5 Cir., 1964]), and as such the prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer". The prosecutor's interest "therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done" (*Berger* v. *U.S.*, 295 U.S. 78, 88; *U.S.* v. *Graham*, 325 F. 2d 922, 928, 6 Cir., 1963).

It is noteworthy moreover even where defense counsel "never requested the disclosure of evidence from the prosecution" as Judge MARSHALL points out in *Wilkins, supra*, "such request is not a *sine qua non* to establish a duty on the prosecutor's part" (p. 137).

Petitioners' post-verdict motion sought a new trial because of the erroneous rulings sanctioning suppression of the Carmick deposition; especially in view of the newly discovered evidence emanating from Mr. Carmick through his affidavit and communications (A105a-7a). At a post-verdict conference (A220a) Judge TYLER noted that appellants' post-verdict motion was being denied that day (A223a), and commented: "Mr. Gottlieb, for example, you sought formerly on a number of occasions to have me turn over to defense counsel the Carmick deposition" and "I refused to do that under what I considered then and still consider sound grounds" (A225a). The post-verdict motion was summarily denied. *United States* v. *Pellegrino*, 273 F. 2d 570 (2 Cir. 1960), cited by Judge TYLER (A236a) is clearly inapplicable; it holds that a motion for a new

trial is not maintainable on the ground of newly discovered evidence which with due diligence was discoverable before or during trial. That is a far cry from justifying the refusal of Government counsel to make available the depositions of Carmick, not government documents but the property of the New York law firm that placed them in the government's possession, returnable upon demand, and who expressly authorized that they be made available to petitioners' counsel. It can hardly be doubted, in view of Mr. Carmick's affidavit and communications, that his depositions necessarily must lead to material favorable to the defense both on the substantive counts and as well on the charge of conspiracy.

Judge TYLER's statement "that there was then no apparent interest on the part of said defendants to call Carmick as a witness or recall the witness Chamberlin in order to delve deeper into these matters" (A236a) utterly ignores the fact that Carmick, a Chicago attorney and admittedly no friend of Abrams, was enjoined by Government counsel to secrecy, and that Chamberlin lived in Honolulu; the Government of course was able to and did readily bring him here (M113-8). How could defense counsel reasonably determine the course to pursue unless the deposition was made available when requested, a necessary preliminary to a sensible determination as to whether to call Carmick as a witness, or what use to make of the deposition.

In the foregoing posture, the conclusion is inexorable that the deposition contained material beneficial to the defense, else there would not have been such strenuous resistance to its production. The authorities are legion to the effect that documentary evidence, *including matter normally privileged from disclosure* by the Government, must be made available to the defense, if of an exculpatory nature. (*Brady* v. *Maryland*, 373 U.S. 83 [1963]; *Jencks* v.

United States, 353 U.S. 657 [1956]; *United States* v. *Reynolds*, 345 U.S. 1, 12; *Kyle* v. *United States*, 297 F. 2d 507, 513 [2 Cir. 1961]; *United States* v. *Andolschek*, 142 F. 2d 503, 506 [2 Cir. 1944]).

The Court of Appeals' opinion revealed this further grave misconception:

> "The court made it abundantly clear that if Abrams wished to obtain the document for any purpose, he could always obtain the document by serving a subpoena and using the document as best he could" (App. p. O-12, *infra*).

As the excerpts from the record previously quoted make clear, the Court below was in error. The deposition itself was actually in the courtroom when defense counsel requested its production. For the Court below to state that it could have been obtained "by serving a subpoena" simply ignores what actually took place and fails to recognize that the Trial Court's ruling did not turn upon the failure to serve a subpoena. The sole purpose that a subpoena duces tecum could serve was to have the deposition produced at the trial. Since it was already then present in the courtroom, to affirm the denial of its production on the ground that no subpoena had been served is utterly untenable. As Cardozo, Ch. J. pointed out in *People* v. *Miller*, 257 N.Y. 54 (1931), "When documents present in court are of such a nature that if called for by a subpoena they would be subject to inspection by the adverse party, *the duty of the judge* is to direct the holder of the documents to produce and exhibit them, * * * [since] the formality of a subpoena ought not to be insisted upon when it will serve no useful purpose, and least of all to the prejudice of one in jeopardy" (pp. 58-9). Wigmore points out that as far back as 1852 in *Dwyer* v. *Collins*, 7 Exch. 369, the court held that no notice for the production of a document present in court need be served, saying "it would seem scan-

dalous to the administration of the law" if such "objection had prevailed" (*Wigmore on Evidence,* 3rd Ed., § 1204, Vol. IV, pp. 364-6). The Carmick deposition was present at all times in the courthouse where the case was being tried. Even if not actually in the courtroom at the precise moment that request therefor was made, the task entailed simply bringing it from the prosecutor's office in the building to the floor where the trial was in progress. All of these considerations, however are beside the point, since defense counsel were delegated by the law firm to whom the deposition was returnable "on demand" to get it, and defense counsel were armed with the receipt confirming their right to assert such demand (pp. 22-4, *supra*).

2. *It was a denial of due process to bar petitioners from participating in the proceedings involving the mental capacity of co-defendant Albert.*

During trial, serious incidents occurred involving defendant Albert's conduct, both with regard to the jury and in the alleged presentation of forged evidence, matters of so grave a nature that the transcript in respect thereof was ordered sealed (A249a-50a). The first incident occurred two months before the trial was concluded and involved Albert's improper approach to a juror. After a hearing attended only by Government counsel and the attorneys for Albert (M7083-7316), the Court decided that "in fairness" counsel for the other defendants ought "to see this record" (M7216). A further conference was then held (M7495-7515) at which counsel for petitioners was prompt to voice his misgivings about Albert's mental instability* (M7500-1). Further hearings were held regard-

* The record shows: "MR. GOTTLIEB: * * * Let us put it bluntly. If Mr. Albert approached her innocently, and I assume maybe *he is psychopathic,* he did it openly. I can see if he wanted to approach her improperly, I guess he would not do it in a public place. I want to argue in his favor. But that does not reduce the enormity of the fact that there has been an approach, so far

ing Albert's untoward conduct, *at which point petitioners moved for a severance, which the trial Court denied* (M7502, 7551). Counsel for Albert asked leave to withdraw as his attorneys (M7545-6), although they continued "as assigned counsel" (M7546), and served without compensation (M7549-50). The Court denied the application "by defense to withdraw Miss Del Franco as a juror" (M7550). At the conclusion of trial, notwithstanding that Judge TYLER had previously "warned Albert", there was a further incident involving a juror (A421a-2a).

On February 5, 1964, Albert's counsel moved "pursuant to 18 U.S.C. Section 4244 for a psychiatric examination on the specific ground that Albert had been unable to assist his counsel properly in the defense of this case" (M10884), counsel having learned that Albert had received psychiatric treatment from a Dr. Peter Denker *about four years* previously, who decided then that Albert "was psychopathic" (M10886-7). After discussion the Court determined to "reserve decision on this motion" (M10890). Counsel indicated that he had "wanted to make this motion about ten days or two weeks ago", and had endeavored "to get a current psychiatric examination, which I have not been able to do" (M10890a). Judge TYLER asked to be supplied "with the results of the encephalogram taken by Dr. Denker four and a half years ago", which counsel undertook to do (M10891). Counsel for petitioners renewed the *motion for a severance* made at the time of the very first incident involving a juror, as noted above, which the Court again denied (M10892).

Petitioners' counsel were requested to attend a hearing a month after the jury's verdict and were surprised to

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as I am concerned." (M7500-1) The comment of Albert's counsel was indeed prophetic. "MR. CAHN: * * * We feel that Mr. Gottlieb may have hit closer to the truth than anyone else here with respect to the frame of mind which would compel a man to do this thing" (M7508).

learn that a further application by Albert's counsel had been addressed to Judge TYLER on the question of Albert's mental responsibility (A201a-3a). Our position was that sentence be deferred pending the outcome of that issue since, as we were told, the Court on the day preceding had actually signed an order "sending Mr. Albert out to the Springfield, Missouri psychiatric hospital there for examination and report" (A206a).

A further hearing ensued on April 22, 1964 (A213a). The Court advised counsel of "a letter dated April 20, 1964" received "from Dr. Jesse D. Harris, the Warden and Chief Medical Officer of the Springfield Missouri Federal Medical Center" (A213a); the letter reflects the gravity of the situation: "we hoped to be able to complete our psychiatric studies and evaluation of the above named individual within the 30 day time limit initially set, it has now become apparent that we will require more time in order to make a thorough study"; the medical staff had been "engaged in digesting various material from outside sources and have *found it necessary to refer our electroencephlogram to a specialist in St. Louis for his interpretation*" (A214a). Sentence of these petitioners was thereupon deferred (A218a).

At the next hearing on July 28, 1964, we were advised that Albert had suffered "a rather serious coronary incident and has been hospitalized" (A220). After discussion of the necessary delay occasioned thereby, the Court advised that "a number of copies of these medical reports exclusive of the Dr. Banay report * * * were made by Mr. Armstrong, in other words, Mr. Gottlieb, for all of us to have them" (A2228a). The Court directed that they be made available to us (A228a-32a).

Judge TYLER then inquired, "assuming that we were to go ahead with sentencing prior to any hearing and determination of the Albert Section 4244 issue, is there anything

in the law which would preclude your clients from ever raising any possible issue on their own behalf engendered by whatever the determination is there?" (A232a) Counsel responded that that very matter was giving rise to "the most serious concern" (A232a-3a). Recognizing that "there is a lot to be lost, both in human terms and in legal terms", Judge TYLER reiterated a request previously made to Mr. Gottlieb for a letter on the subject (A233a).* Counsel promptly wrote Judge TYLER on August 5, 1964. After referring to the incident in December, 1963, that caused petitioner's counsel then to observe that "maybe he [Albert] is psychopathic" before having had "any inkling that any such issue" would be presented (A250a), the letter states:

> "As your Honor knows, until the medical reports were furnished to me at the Court's direction pursuant to the proceedings had on July 28, 1964, *we, as counsel for Abrams and Richland, were completely excluded from participating in or being heard on the issue as to defendant Albert's mental competency.*" (A250a)

The communication then proceeds:

> "I have read the medical report submitted by Dr. Banay on behalf of defendant Albert. Dr. Banay,

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* "MR. GOTTLIEB: * * * But the concomitant considerations are so important and so grave that I would feel that, for example, if it should prove—and I am talking without having seen the medical report at all, therefore I am talking completely in the dark—if it should really turn out—let me assume for the sake of discussion—that Mr. Albert was really mentally disturbed or mentally ill, so that the things that occurred during the trial can be said were the direct result of his mental aberrations and the difficulties that we experienced, and I can show both from the record and prior to the record, discussions that I had with his counsel, when we ourselves had suggested at times when his conduct seemed to be, to say the least, bizarre, why don't they subject him to a psychiatrist, and then Mr. Cahn for the first time said that that is exactly what he had done—I therefore feel that as a matter of simple justice as against the prejudice that we must suffer because of delay we must— THE COURT: That is what I want you to put in your letter. I am aware of what you have in mind generally. Now what I want is your considered views in writing" (A233a).

who is a diplomate of the American Board of Psychiatry and Neurology I understand is a noted and respected medical authority on mental illness. In the light of that report, I read with scrupulous care the 'reports of the neuropsychiatric examination, the neuro-psychiatric staff examination and the physical examination made in the case of Sydney L. Albert' that were submitted to your Honor. In view of the Court's injunction at the proceedings of July 28, 1964 to keep the matters referred to in these reports confidential, I will refrain from making specific reference thereto. A mere reading of the Government's reports alone, even to the most skeptical and critical mind, would make it evident that the issue as to Albert's mental capacity must necessarily be considered of serious concern. I think without being deemed guilty of transgression we may refer to the observation made therein that *'he does not seem to be able to cooperate with his attorneys as far as we can determine from the information we have at present'* " (A251a).

Counsel then referred to the Warden's observation that:

> " 'While no clear-cut picture exists, the reports *tend* towards supporting a finding of competency' " (A251a).*

Counsel's letter pointed out that "in the absence of explanatory testimony, it is to say the least baffling" to find

* In connection with the above quote, we feel justified in setting forth the following excerpt from the report of Dr. Rothstein, one of the staff psychiatrists at Springfield: "Although this is a question of competency it approaches in many respects the question of responsibility or sanity. Mr. Albert is alleged to have engaged in certain behavior in court and during the proceedings and the question seems to be whether this behavior was 'criminal' as the prosecution claims or 'incompetent' as the defense apparently claims. Just as a mentally ill defendant may nevertheless be legally sane so too may Mr. Albert even with his emotional problems nevertheless be competent. *It was the opinion of the staff that since this case lies very close on the borderline that it is quite difficult to give a clear-cut answer with regard to competence. The staff did not arrive at a clear-cut answer,* but did tend toward the opinion that the patient is competent". Dr. Rothstein nonetheless concluded in his report "that the patient is competent" !

conclusions that are "contradictory with each other and in turn in conflict with specific findings and determinations made as to defendant Albert's mental capacity and competency". We therefore urged that "a hearing is necessary under §4244 USCA" which we noted was not even challenged by Government counsel (A252a). Moreover, we urged that "such hearing be held at the behest of defendants Abrams and Richland irrespective of whether or not they had been demanded by counsel for defendant Albert" (A252a). Our communication emphasized that:

> "It must be borne in mind that the issue before this Court under 18 U.S.C.A. §4244, is not whether the defendant was or is legally insane, but whether or not he was unable properly to assist counsel in the preparation of his own defense (cf. *U.S.* v. *Valentino,* 283 F. 2d 634, 635; 2 Cir. [1960]). Since the defendant Albert was alleged to be in conspiracy with these defendants, it is of course imperative that the issue of defendant Albert's mental competency at the time of these transactions and at the time of the trial be set at rest" (A255a-6a).

Petitioners did not seek to delay sentence and were prepared to proceed promptly with the hearings that would be concerned with examination of medical experts, even though defendant Albert, because of his coronary condition, could not attend. We cited *Johnson* v. *United States,* 293 F. 2d 100 [5 Cir. 1961], supporting that position (A253a). Counsel for Albert opposed and insisted in his letter of August 7, 1964, "that no counsel should be heard on the matter of Albert's competency except counsel for those parties referred to in Section 4244", and that "participation in the hearing by counsel should be limited to counsel for the Government and counsel for Albert" (A245a-6a). The Government, by letter of August 7, 1964, urged that petitioners "be sentenced immediately", and that "Sydney Albert's psychiatric hearing should not be held in his absence" (A247a).

A week later, Judge Tyler in a formal opinion (*U.S.* v. *Abrams,* 35 F.R.D. 529 [1964]; App. *infra,* pp. O-23, O-28) noted that "several days prior to the verdict date and on the morning after both the prosecution and all defendants had rested, but before summations had begun, counsel for defendant Sydney L. Albert made an oral motion on the record pursuant to 18 U.S.C. 4244 for a determination that that defendant was and had been throughout the trial incapable of fully understanding the nature of the proceedings and participating in his own defense" (A237a); the opinion notes that "some weeks after the verdict and *at the invitation of the court,* counsel for Albert submitted affidavits and other materials in support of his motion pursuant to Section 4244" and that "hearings and conferences were held, as a result of which this court entered an order committing Albert to the United States Medical Hospital in Springfield, Missouri for observation and report by government psychiatrists", and that after the "reports of the latter were received * * *, it was agreed by *counsel for the government and counsel for Albert that a full hearing* on the Section 4244 issue would commence on August 12, 1964" (A238a).

Judge Tyler referred to the "acute coronary" suffered by Albert, and stated: "I determine that Mr. Albert reasonably can be expected to be a convalescent patient until on or about December 1, 1964 and thus not reasonably available for participation in any hearings until that date at the very earliest" (A239a). Accordingly, the Court adjourned the hearings on the issue of competency *sine die* (A239a). After referring to the communication of petitioners' counsel sent as aforesaid (A239a-40a), the opinion concludes:

> "It is true that neither court nor counsel have been able to uncover any authorities dealing squarely with the problem. Yet as I view the matter, even if it be assumed that the two defendants in question will be substantially affected by the outcome of the

Albert Section 4244 hearings, there is no legal or practical impediment to their making such appropriate applications to fully protect their rights as they are advised when this court finally reaches a determination required by Section 4244.

"More particularly, assuming that said two defendants in the future will be advised to contend that the claimed incompetence of another defendant so infected the trial as to create essential unfairness to them, there would then be open a number of procedural avenues to adequately raise such a point. See Rule 33, Federal Rules of Criminal Procedure; *United States* v. *Norman Brown, et al.*, 335 F. 2d 170, slip opinion of August 5, 1964 (2d Cir.)". (A240a).

The Court denied further postponement of sentence (A241a-2a*).

We were not informed as to when the hearings took place, nor given an opportunity to attend. Petitioners were sentenced on September 14, 1964. The hearings as to Albert's

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* JUDGE TYLER ruled: "As I understand them, they are in practical effect urging that they be permitted to examine and cross-examine witnesses and to offer such other evidence as they deem advisable. *Conceding that these defendants have an interest in the proceeding and its outcome,* I fail to see any reason in law or logic for permitting this kind of participation by others than the attorneys for the government and the defendant Albert. This court has already directed that counsel for Abrams and Richland may have access to all medical reports and other material which tends to relate to the competency issue, with suitable safeguards, however, to protect insofar as possible the privacy of the defendant involved and his family. *Further, of course, there would be no objection to a representative or representatives of the two defendants in question attending the hearing.* All of this more than adequately protects the basic rights of the two defendants in question. To permit their counsel to take a more active role would unnecessarily complicate and prolong this already protracted litigation. Also, it should be observed that counsel for the defendant Albert flatly oppose this request by the attorneys for Richland and Abrams, and the government has voiced similar opposition. *It is concluded, therefore, that the lawyers for Abrams and Richland should not be permitted to directly participate in the Section 4244 proceedings as they request*" (A242a).

competency were thereafter held. The minutes and the opinion of the Court dated February 2, 1965 were directed to be sealed, "subject to the further orders of this Court" (A175a). We obtained a release of the opinion which is now before the Court (A168a-75a). The opinion indicates that "evidentiary hearings on this matter were not held until January 12 and 13, 1965" (A170a), and that "the two-day hearing consisted of the testimony of not only Dr. Banay, but also three staff psychiatrists from the federal hospital at Springfield, plus, of course the written reports of Dr. Banay and the staff at the federal facility" (*id.*) Without the transcript we are of course handicapped, but it is important to note that Dr. Banay, an outstanding medical authority (A251a) as Judge TYLER's opinion points out, voiced the following conclusion:

> "It is my opinion that (Albert) never operated on a mentally-sound foundation, and when his trial came he was incompetent to assist his attorneys or participate adequate (sic) in his own defense" (A170a).

On the witness stand, as the opinion points out, "Dr. Banay gave his diagnosis that the defendant was and is 'suffering a chronic form of mental disorder known as paranoid personality, and against this paranoid personality he developed a secondary condition, so-called manic reaction which is a defensive pattern'" (A170a). Moreover, Albert was *"unaware of his deep seated pathology"* and "in all probability *was suffering from paranoic delusions as early as 1954*" (A171a). Judge TYLER's opinion refers to the testimony of Dr. Glotfelty, chief staff psychiatrist at Springfield, who testified "that defendant has and has had a personality disturbance with some attendant feelings of depression", and although he disagreed "with Dr. Banay's primary finding of deep-seated paranoia", *he nonetheless "agreed with Dr. Banay upon the secondary findings of symptoms of hypomanic activity—, i.e. a manic*

reaction" (*id.*). Dr. Glotfelty, however, concluded that Albert "was capable of rational cooperation with his attorneys in the preparation of his defense during trial" (*id.*).

The opinion further points out that Dr. Rothstein "*concurred with Dr. Banay in the finding of some personality disturbance with attendant symptoms of depression and manic reaction*", and that "his difference with the views of Dr. Banay *was one of degree*" (A171a-2a). Dr. Rothstein as already noted (p. 34, *supra*) "participated in the June 2 staff interview of Albert, and it was he who wrote the final staff report"; Dr. Rothstein in his final report had used the phrase "borderline case" referring to Albert, but on the witness stand according to Judge TYLER "he explained that he did not use this phrase to indicate that this was a close case on the strict medical-legal issue of competency", but "it was his intention to indicate by this phraseology his opinion that the defendant closely approaches the dividing line between legal and criminal behavior patterns—i.e. that Albert's case presented a close question of culpability which was for the court and of course not for the medical profession to decide" (A172a).

An issue of this gravity of course merited fullest exploration, and counsel for petitioners, we submit should have been afforded opportunity for cross-examination and for the submission of pertinent medical proof, which Albert, *because of the then existing antagonism between himself and his own lawyer** and his physical and mental condition

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* We quote from Dr. Rothstein's report of Albert's neuropsychiatric examination: "The patient states that he feels he is competent and *that it is the lawyer's contention that he is incompetent. * * * All in all, the patient gave the appearance of being a quite disturbed and emotionally ill individual who was trying to appear healthy and utilizing every resource to do so*" and "*many of the aspects about this patient seem consistent with manic behavior*", and "it is my impression that as this finally sinks into the patient, he may tend to go into a serious depressive reaction, *his manic behavior would be consistent with his behavior in court* as far as can be determined by what has been described

and straitened financial circumstances, may not have been in a position to supply. Small wonder in the face of what is quoted below, as Judge TYLER points out, that Dr. Weyland, another staff psychiatrist at Springfield, who testified and "who was in charge of the ward to which Albert was assigned during his stay at that institution", was "*in substantial agreement with all other doctors* that this patient presented a pattern of some mental disturbance" (A172a).

Judge TYLER after a *two-day hearing* found: "On the basis of the *available evidence* I determine that the *defendant is and has been emotionally disturbed to a degree discernable by at least qualified specialists,* particularly since in or about March 1964." (A173a) However the Court concluded that although mental aberration was present, there was "no persuasive evidence to support the conclusion *that Albert's mental disturbance, even if at a psychotic stage,* was sufficient to impair his realistic and rational cooperation with defense counsel" (A175a).* It is im-

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so far, that is, he seems to have shown a lack of understanding of the seriousness of his behavior and that it could be seriously prejudicial to his legal position. In this sense it could be considered that his behavior in court does result from his emotional illness * * *. Nevertheless I think we can say here with reasonable degree of assurance, first of all that the patient does understand the charges, secondly, *he does not seem able to cooperate with his attorneys as far as we can determine from the information we have at present* * * *. Some of the evidence of the patient's inability to cooperate with his attorney are his not paying his attorneys and *his feeling that his present attorney is incompetent. I believe this behavior is on the basis of his mental illness.* This does include many sociopathic qualities, but there are also some paranoid elements of a megalomanic nature in which he feels he can do the job best and there is also the previously mentioned manic denial."

* JUDGE TYLER stated: "Further, if I were to assume that the defendant from September, 1963 to February, 1964 was a psychotic, I do not believe that this in itself would necessarily require a finding that Albert could not rationally cooperate with and assist his defense counsel '. . . [T]he pages of history are dotted with paranoiacs, . . .', many of whom have managed to get along in the world. In short, I find no persuasive evidence to support the conclusion *that Albert's mental disturbance, even if at a psychotic stage,* was sufficient to impair his realistic and rational cooperation with defense counsel." (A175a).

portant to note that it was not contended that Albert's antagonism toward his attorneys or his "mental disturbance" were feigned. The medical report of the staff at Springfield indicated directly to the contrary:

> "*All in all the patient gave the appearance of being a quite disturbed and emotionally ill individual who was trying to appear healthy and utilizing every last resource to do so.* There is of course the possibility that given the patient's degree of intelligence and postulating a high level of cunning that he could realize that trying to appear sick would be very obvious and *he might be indirectly trying to look sick by means of giving the impression that he is doing his best to look healthy. However, it would take an extreme stretch of the imagination to maintain this latter opinion of the patient for very long.*"

So far as petitioners are concerned, the matter must be viewed from a different perspective. Prejudice to them did not depend upon a *medico-legal determination* governed by the tests of criminal responsibility, as laid down by this Court in *Davis* v. *United States,* 160 U.S. 469, 486, 487, 488 [1895], which repudiated the celebrated *McNaghten* case as to the burden of proof, or in the second *Davis* case, 165 U.S. 373, 378 [1897], adhering to the rule in its earlier decision that the burden of proof is never on the accused (see, also: *Argent* v. *United States,* 325 F. 2d 162, 170-2 [5 Cir. 1963], cited with approval in *Merrel* v. *United States,* 338 F. 2d 763, 766 [5 Cir. 1964]).

The problem confronting petitioners, as Judge TYLER himself recognized by inviting the comment of their counsel (A233a), and thereafter in his opinion, is that "[a]s is *obvious to all concerned,* it is at least theoretically possible that the two mentioned defendants [petitioners] will be at least indirectly affected or concerned about the outcome of the competency issue involving the defendant Albert" (A239a-240a). Moreover, as Judge TYLER's opinion noted,

"neither court nor counsel have been able to uncover any authorities dealing squarely with the problem" (A240a). Manifestly the only means by which petitioners could demonstrate the *reality* of that *theoretical possibility* was by participation in the hearings and development of the proof with respect thereto. Our communication to the Court emphatically so stated (A250a-55a). The denial of the right to do so, we submit, was a denial of due process.

Judge TYLER reasoned that "assuming that said two defendants in the future will be advised to contend that the claimed incompetence of another defendant so affected the trial as to create essential unfairness to them, there would then be opened a number of procedural avenues to adequately raise such a point" (A240a), citing Rule 33, Federal Rules of Criminal Procedure, and *United States* v. *Norman Brown, et al.*, 335 F. 2d 170 [2 Cir. 1964]. The Court's reliance was misplaced. In *Brown*, appellant's contention that a co-defendant, Fairorth, who represented himself at the trial, "was insane or incompetent at the time of trial and that this prevented a fair trial for both", as the Court pointed out, "*was not raised at the trial* and is not before us on appeal as such a defense" (p. 173*).

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* The Court ruled: "The motions, made while the case was on appeal, were denied as untimely under Rule 33. This ruling was proper. The District Court was without power to grant a motion for a new trial on the ground of newly discovered evidence while the case was pending here on appeal. Nor do we consider that remand should be had for consideration of the motion for new trial on the basis of the affidavits submitted. The affidavits of Fairorth, a psychiatrist and a psychoanalyst fall short of a showing of insanity, or, in the face of the trial record, of incompetence and in any case relate primarily to observations of Fairorth's condition prior to trial and cannot be considered evidence newly discovered after trial. *If present mental illness appears in the study under §4208(b), recourse may be had to 18 U.S.C. §§4241-4247, and of course, if substantial claim is made of insanity or incompetence at the time of trial, the judgment may be collaterally attacked.* See Kyle v. United States, 288 F. 2d 440 (2 Cir. 1961); Catalano v. United States, 298 F. 2d 616 (2 Cir. 1962); United States v. Cannon, 310 F. 2d 841 (2 Cir. 1962)." (p. 174)

Notwithstanding that the medical affidavits fell short of showing incompetence "in the face of the *trial* record", the Court in *Brown* did not preclude a hearing if "present mental illness" appeared, and recognized the validity of a collateral attack on the judgment of conviction on that basis. Here petitioners' contention with respect to the prejudicial conduct of Albert was presented during the trial itself where prompt relief was sought in the repeated motions for severance (p. 31, *supra*), and thereafter by our application to participate in the formal hearings and for the deferment of sentence until the determination thereof (pp. 35-7, *supra*). Our position was reiterated on our post-verdict motion (A112a). The situation here presented, therefore, was directly contrary to that in *Brown*. Albert's queer actions *during trial* raised the *bona fide* misgivings of his own lawyers, who thereupon withdrew as his attorneys and would and did proceed only "as assigned counsel". *During trial,* his counsel produced competent medical proof of mental disorder (p. 31, *supra*), and Judge TYLER reserved decision, deferring formal inquiry until after the jury's verdict was returned (p. 31, *supra*). In that situation, *Merrel* v. *United States,* 338 F. 2d 763 [5 Cir. 1964], is of controlling significance. There the Court said:

> "Dr. Glotfelty testified at length on government rebuttal that defendant had admitted he was acting or feigning insanity. At the conclusion of government rebuttal the trial court refused to permit defendant's surrebuttal explanation, as requested by counsel for the defendant. While surrebuttal is within the sound discretion of the trial court and is usually denied to avoid repetition, it should have been permitted here.
>
> "The feigning admission was initally introduced by the government's rebuttal witness. *Under the peculiar rule relating to burden of proof on the defense of insanity, where, as here, defendant has pro-*

> *duced 'some evidence' of mental disorder, the 'burden of persuasion', the 'risk of non-persuasion', or, less precisely, the 'burden of proof 'was upon the government to establish defendant's sanity beyond and to the exclusion of a reasonable doubt at the very moment the government witness first mentioned the feigning admission.* Davis v. United States (1895), 160 U.S. 469, 486-488, 16 S. Ct. 353, 358, 40 L. Ed. 469, quoted in Argent v. United States (5 Cir., 1963), 325 F. 2d 162, 170-171; IX Wigmore on Evidence, 3rd Ed. (1940), § 2485; American Bar Fnd., The Mentally Disabled and the Law (1961), p. 350." (p. 766)

The Court ruled that refusal to permit defendant's surrebuttal explanation as to his alleged admission of feigning insanity was error calling for reversal of the conviction (p. 768).

There is no tenable basis upon which the procedure below can be sustained. Petitioners' application for deferment of sentence was timely and indeed so recognized by the Court, but was refused solely because of defendant Albert's having suffered "a coronary incident"; petitioners sought no delay on that score, but expressed willingness to proceed and to participate in the hearings in Albert's absence (A240a-2a); Judge TYLER refused to adopt that procedure (A241a*). Petitioners were not accorded the opportunity to offer a suggestion with respect to the course or conduct of

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* Judge TYLER ruled: *"Citing Johnson* v. *United States,* 293 F. 2d 100 (5th Cir. 1961), counsel presses upon the court the argument that the Section 4244 hearing on behalf (13185) of Mr. Albert can appropriately be conducted in his absence. *Both government counsel and the attorneys for Mr. Albert oppose this proposition.* Further, as I understand it, Mr Albert himself wishes to be present at this hearing. No doubt Abrams and Richland press this argument in good faith, but in my view the *Johnson* case presented circumstances different than those here presented and thus is inapposite. Moreover, there exist other reported cases suggesting serious practical and legal problems if one of these proceedings is conducted in the absence of the party whose competence is in question. See, for example, *Martin* v. *Settle,* 192 F. Supp. 156 (W.D. Mo. 1961). It is directed, therefore, that if, as and when the Albert hearing goes forward, absent sound medical or other reasons not now known to the contrary, Mr. Albert should be present." (A241a)

the proceeding, nor even permitted to advise the Court what proof they might offer, certainly a denial of due process in view *of the trial record* as it reflected Albert's conduct and the medical reports submitted on behalf of the Government and in his own behalf. *Johnson* v. *U.S.*, 293 F. 2d 100, was cited to Judge TYLER (A241a):

> "Finally, there is no merit in appellant's contention that the District Court erred in excluding him from the courtroom during the testimony of the psychiatrists. On motion to vacate sentence under Title 28, United States Code, Section 2255, the statute itself provides that the court 'may entertain and determine such motion without requiring the production of the prisoner at the hearing.' Appellant was represented by counsel, and was before the court pursuant to a writ of habeas corpus ad testificandum. His presence there was for a specfiic purpose, e. g., to testify. The court's purpose in excluding him, as appears from the record, was for the benefit and mental well-being of appellant in that he might be affected adversely by hearing testimony relating to his mental condition." (p. 102)

The foregoing authority fully justified our suggested procedure. If Albert, as the Springfield medical report indicated, was "trying to appear healthy" rather than feigning insanity and "utilizing every last resource to do so", *a fortiori* could Judge TYLER with complete propriety have permitted the proceedings to begin promptly, notwithstanding Albert's inability to be present by virtue of his coronary hospitalization. Since the hearings necessarily would concern themselves basically with the medical proof, it is difficult to perceive what Albert's presence could add, especially if we are to assume he would then be still "trying to appear healthy" and would continue "utilizing every last resource to do so".* Albert's absence, as *Johnson* pointed

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* Since the minutes are sealed (A175a) we have no means of knowing whether Albert or more importantly his attorneys testified on the issue of his inability to cooperate.

out, in these circumstances, might well be desirable for his "mental well-being" (p. 102).

Denying petitioners the right to attend and participate regardless of Albert's ability to be present, was prejudicial and a denial of due process. Judge TYLER's ruling that there are "a number of procedural avenues" still open to petitioners to present this issue (A240a) does not obviate the error. (Cf. *Meador* v. *United States,* 332 F. 2d 935 [9 Cir. 1964], cited with approval in *Merrel, supra* [p. 766]).

More important, as this Court in the *Davis* case (*supra*), held, the prosecution and not the accused has the burden of proof on this issue. The procedure adopted below thrust upon petitioners the burden of now going forward with a new hearing to question Albert's mental competency, after having been foreclosed by the trial Court from attending at the formal hearings that were held when it was possible to cross-examine the *medical experts then available* as witnesses for the Government and for Albert, and to present further proof when it would have been most effective, practical and expeditious to do so. Manifestly no like opportunity now exists.

As the court said in *Meador, supra,* "[p]erhaps that difficulty is not insurmountable, and perhaps it may be appropriately faced in a collateral proceeding, or in a proceeding where there are special circumstances", but "on a direct appeal from the conviction we believe the accused should not be required to run that gantlet" (p. 939). So in the instant case, in view of the compelling circumstances here present, petitioners should not, as a matter of due process, have been required to run the "gantlet" prescribed below, but timely intervention in the formal proceedings regarding Albert's mental health should have been allowed.

The Court of Appeals misapprehended what took place after trial and thus failed to treat with the issues here presented. The Court's opinion states as follows:

> "Judge Tyler directed that all pertinent medical reports and written material be made accessible to Abrams and *he even offered to allow representatives of Abrams to attend the hearing.*" (Appendix, *infra*, p. O-18)

Judge Tyler actually ruled as follows:

> *"It is concluded, therefore, that the lawyers for Abrams and Richland should not be permitted to directly participate in the Section 4244 proceedings as they request"* (A242a).

This denial of petitioner's right to participate was made over the strongest objections, and the hearings were held without notice to petitioners so that we did not have opportunity even to attend. Moreover, the transcript of the two day hearings on the question of Albert's mental condition was sealed and has still not been made available to petitioners (A175a).

A severance in effect was granted to Albert on this important issue, thus recognizing that Albert and petitioners as matter of law as well as in fact (pp. 2, 18, 22, *supra*) were in hostile relationship. Petitioners' applications during trial for a severance should have been granted, especially since petitioners moved to waive a jury and have all issues simultaneously tried, but determined as to them by the Court alone. The denial of such relief was demonstrably a deprivation of due process.

Petitioners at the outset of trial moved for a severance, stating "that such an application was made before Judge CASHIN and denied" (M67-8; *U.S.* v. *Abrams*, 29 F.R.D. 178, 181, 182). It was then pointed out that the Court had "severed 28 out of 52 counts, so that the majority of the counts have been severed against these defendants", and "when the Government asked that the majority of the counts be severed * * *, they have very little reason to complain if the court were to ask that the minority of the counts now remaining in this indictment likewise be severed" (M68); the motion was denied (M69). On the basis of the antagonism that existed between peti-

tioners and Albert, counsel made several motions for a severance, which the Court denied (M2416). The motions for severance were renewed by petitioners at the time of Albert's queer behavior, as already noted (M7502, 7551, 10892; p. 31, *supra*). Ultimately petitioners were excluded from participation in the mental health proceedings on the very basis of existing hostile interests (A242a, 245a-6a).

When this case first came before Judge NOONAN and thereafter before Judge RYAN, on pre-trial, petitioners endeavored to waive a jury (PM12135).* At a subsequent pre-trial session petitioners urged Judge TYLER to try them "without a jury no matter what the other defendants did" (PM12216-21), Albert and Knohl having refused to waive a jury (PM12215-6). As to the procedure suggested by petitioners, Judge TYLER stated, "I never heard of it in a criminal case" (PM12217); nevertheless there is precedent in support of our position.

In *Fernandez* v. *United States,* 329 F. 2d 899 [9 Cir. 1964], after denial of one defendant's motion for a severance, defendant Delay filed a waiver of trial by jury and requested that his "case be heard at the same time as those of the other defendants". Accordingly, as the court pointed out, "there was a severance in the limited sense that Delay's case was to be submitted to a different fact finder, the Judge instead of the jury" (p. 902). In *United States* v. *Zuideveld,* 316 F. 2d 873 [7 Cir. 1963], cert. denied 376 U. S. 916, "ten defendants went to trial and of these two elected to be tried by a jury" and "the remaining eight

* The record shows: "MR. GOTTLIEB: Your Honor, I have the consent of my clients to waive a jury and I think I have been going to the utmost limits in reposing my faith in the Court and therefore what your Honor requests necessarily must be answered yes, and I don't say that to curry the Court's favor. I say that as a practical consideration that a lawyer in my position must take since I will persist in these issues, in asking a jury be waived, and therefore I am placing our whole disposition in your Honor's lap as sole trier of the facts and the law" (PM12135).

defendants including appellants, waived a jury trial and were tried by the court in a bench trial simultaneously with the jury trial'' (p 875).

It requires no extended argument to demonstrate that petitioners' ''reasons for wanting to be tried by a Judge alone were so compelling'' that the refusal to recognize their waiver of a jury, coupled with a limited severance that would have permitted simultaneous trial of all issues, but determination thereof as to petitioners by Judge TYLER alone, constituted a denial of due process (cf. *Singer* v. *United States,* 380 U.S. 24, 37, 38 [1964]). The trial admittedly involved ''highly technical'' statutory violations, complicated questions of law and unclear statutes that baffled bench, bar and financial experts. The transactions in issue required understanding, analysis and ability to evaluate complicated corporate procedures involving the marketing of securities, problems of corporate finance and intricate problems of corporate accounting. A trial of five and one-half months with so many witnesses and volumes of documents made it impossible for a lay jury taking no notes to keep in mind, much less to give adequate consideration to these manifold and complex issues of fact and law. It was patent to petitioners' counsel from the beginning, as it must be to this Court, that a trial before the Court alone was the only means through which essential due process could be achieved in this case to which a non-jury trial was peculiarly and particularly suited.

Defense counsel specifically asserted constitutional grounds lacking in *Singer*. Counsel urged that there was ''an undue over-expansion of the issues'' which ''has resulted in a denial of due process'' (M10970) under an indictment involving a ''highly technical'' statutory offense (M2265) confined, as the Court of Appeals' opinion noted,

to "the narrow issue of illegally selling unregistered stock" (App. p. O-10, *infra**).

3. *Petitioner Abrams obtained immunity under 15 U.S.C. §77v(c).***

This immunity point involves several exhibits marked as *Court Exhibits,* which Judge TYLER ruled "are part of the record" (M8473). The contents thereof were not presented to the jury. Petitioner Abrams contends, and it is undenied, that the bulk of this case consisted of evidence pertaining to purchases and sales of securities by him of Automatic stock and other stock and business transactions involving Bellanca Aircraft Corporation, Pierce Governor Corporation, Standard Industries Corporation and others, as to all of which Abrams had previously asserted his constitutional privilege.†

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* Defense counsel urged: "[I]t is a denial of due process, and upon that ground I also claim * * * that the narrow issues in a case which involve a sale, a technical statutory violation of the Securities Act, have been flooded and literally submerged with a mass of irrelevant testimony that makes it, even for the lawyers, who are skilled and the witnesses who are skilled, to have any fair recollection of what took place or have any fair ability to collate and place these specific transactions in their proper perspective." (M10973)

** 15 U.S.C. §77v(c) provides:

"No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

† The record references where the immunity question was raised are as follows: M7903-15, 8021-24; 8472-8501 at which point the Court reserved decision; 8908-15 where the Court decided the question of immunity adversely; nowhere in the record did the Government raise any issue of fact with regard to the contents of the SEC transcripts (Court Exhs. 166, 167, 168, 169, 170, 171; M7508-9; 7515-18, 8498).

Petitioner Abrams appeared before officials of SEC on June 19, 1956 (Court Exh. 166); June 21, 1956 (Court Exh. 167); July 5, 1956 (Court Exh. 168); July 24, 1957 (Court Exh. 169); and October 1, 1957 (Court Exh. 170) and December 4, 1957 (Court Exh. 171); all transcripts were produced by the prosecution (M7508-9, 7515-18, 8498). On the first three occasions he was questioned by SEC counsel Arthur Goldman, and on the fourth occasion by a hearing examiner. On all these occasions he appeared *under compulsion of a subpoena duces tecum* (Court Exh. 166, at p. 3; Court Exh. 167, at pp. 97-99; Court Exh. 168, at p. 253; Court Exh. 172). On the first occasion Mr. Abrams appeared without counsel, and declined to be sworn (Court Exh. 166, at pp. 8-9). Thereupon Mr. Goldman adjourned the inquiry for *two days* to June 21, 1956 (Court Exh. 166, at pp. 8-10).* On the *second* occasion, June 21, 1956, Mr. Abrams appeared with his counsel, Louis Bender, Esq., but without the subpoenaed documents.

SEC counsel clearly indicated that in connection with the projected investigation, he regarded Abrams as a *"potential defendant"* (Court Exh. 167, pp. 97-99). Mr. Bender requested a copy of the transcript of any testimony taken. SEC counsel replied that the Commission would decide whether or not to honor the request, and then asked this petitioner to state before being sworn as a witness, whether he would testify.**

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* At the *first* interrogation, the following took place:

"Mr. Goldman: Mr. Abrams, this is a private investigation of the Securities & Exchange Commission to determine whether any of the acts administered by the Commission have been violated in connection with transactions involving the stock of Bellanca Corporation; more particularly in the matter of Sydney L. Albert, Joseph Abrams, A. J. Gould & Co., Inc. and Bellanca Corporation." (Court Exh. 166, pp. 2-3).

** "Mr. Goldman: Do you object if I get an answer to that question, Mr. Bender.

Mr. Bender: I do. This man has appeared here now pursuant to a subpoena to testify. His presence here indicates that and I think it is in order for you to put him under oath and then ask him the questions or whether he intends to testify in answer to the questions asked.

Thereafter Mr. Goldman questioned Abrams about *all* his stock transactions *including those in the instant indictment;* and Mr. Abrams consistently claimed his constitutional privilege; SEC counsel sought to interrogate Abrams as to the transactions involving defendant *Albert,* his company *S. Albert & Sons, Bellanca Aircraft Corporation, Automatic Washer, Pierce Governor, David Schindler, Standard Industries, Schiah* and *Sanford Arsham, Samuel Golub,* the brokerage house of *Berk & Company* and any and all transactions involving securities, the 50,000 share block of Automatic acquired as a commission, as to all of which Abrams asserted his constitutional privilege (Court Exh. 169, pp. 104-23).*

Mr. Goldman: You are trying to imply that the use of the term 'to testify' indicates an affirmative response would be construed to mean that he is going to answer each question I pose to him without availing himself, if necessary, of his constitutional privileges here, but it doesn't mean that.

It simply means whether subject to the conditions I have indicated and those conditions were that any questions I put to him the replies to which if he feels would incriminate him and so on and so forth, he can say that he wants to avail himself of that privilege. Subject to those conditions I am asking him if he is willing to testify.

Mr. Bender: All I can say to you Mr. Goldman is, I am aware of what you are saying, the man is here in obedience to your subpoena, he is prepared to testify under the compulsion of that subpoena under oath. I suggest you swear him in.

Mr. Goldman: Will you take the oath?

JOSEPH ABRAMS called as a witness and being first duly sworn, testified as follows:" (Court Exh. 167, at pp. 101-2)

* The record shows: "MR. BENDER: My client wants me to advise you what I told you orally on the telephone on the record that he is now under indictment in the Southern District of New York; he is now under active investigation by the Intelligence Section of the Bureau of Internal Revenue with regard to his taxes up to date. * * * I want you to be aware of the fact that he must assert his privilege in good faith with regard not only to anything which may pertain to alleged violations of the Securities Act and the Securities Exchange Act, of which he may be a potential defendant, but with regard to anything else which may be involved in the present indictment, the present investigation of the Internal Revenue and the present investigation of the subcommittee. I only mention this because I don't want you to feel that this man does not wish to cooperate with you, but he unfortunately is in this position where he cannot, under advice of counsel, take any other position. MR. GOLDMAN: That assumes some relationship be-

There was an adjournment to July 5, 1956 to permit Mr. Abrams to produce the subpoenaed documents. On that day Abrams appeared before SEC counsel Goldman, and produced the documentary material specified in the subpoena duces tecum, except for two papers which he was unable to locate (Court Exh. 168, at p. 256). However, he declined, in exercise of his constitutional rights to surrender such documents to Mr. Goldman (Court Exh. 168, pp. 256, 256a).

Thereafter and on July 10, 1957, Mr. Abrams was again served with a subpoena duces tecum again requiring him to appear before SEC on July 17, 1957 to testify in the *Matter of Bellanca Corp.* and produce voluminous documents (Court Exh. 172; M8498)

On July 24, 1957 Mr. Abrams responded to this *second* subpoena and was sworn before Mr. Frederick Moss of SEC and answered questions and produced documents relating to the transactions and matters as to which he had claimed his 5th Amendment privilege on June 21, 1956 and July 5, 1956, and which transactions and matters constituted the basis for the charges in the instant indictment and the evidence adduced at the trial. Specifically, he testified about the N. O. Nelson transaction (Court Exh. 169, at pp. 711, 764, 769, 772, 773, 779, 801, 812, 815); Mastan transaction (at p. 717); the Heller loan (at p. 729); Automatic Washer (at pp. 733, 737, 746, 760, 762, 780, 804); Rubber Machinery deal involving Automatic Washer stock (at pp. 782, 783, 785, 792, 805, 809); Pierce Governor (at pp. 734, 738); Shindler (at p. 766); Banker's Life Insurance Co. (at p. 840); Selby

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tween the investigation being conducted here by the Securities and Exchange Commission and the investigations being conducted by other departments of the Government as well as the indictment handed down against him, which is an assumption which may not be very well founded. MR. BENDER: As you know, under your Act, if you compel him to testify, then, of course, he will be required to testify with the immunity provided for under the Act, both under the Securities Act and the Securities Exchange Act. Of course, that is a determination that you have to make." (Court Exh. 169, pp. 104-5)

Shoe Co. (at pp. 822, 827); Chamberlin (at pp. 775, 812); Mr. Abrams' sales of Automatic Washer stock in 1956 (at p. 760); and various other matters referred to at great length upon the trial of this case.*

* Indeed, we need but refer to the *Government's brief submitted* to the Court below in opposition to our application for a preliminary determination of the immunity question which (at p. 20) sets forth in parallel columns the pages of the SEC transcript and the pages of the trial record in this case where appellant Abrams was interrogated as to each and where the identical transactions were involved.

"Statement	*Abrams' Testimony*	*Record*
Negotiations for purchase of Automatic Washer	Ct. Ex. 169, pp. 733, 737	[M] Tr. 1236-1238, 1306, 1554-1555, Bar-X**
$1,525,000 Note	Ct. Ex. 169, p. 773	Tr. 995-997, 1315-1316, 1319, 1338-1339
Rubber Machinery	Ct. Ex. 169, pp. 776, 783, 789-790, 808-809; Ct. Ex. 171, pp. 3856-3857	[M] Tr. 1000-1002, 1004-1005, 1421-1433, 1458-1460, 1463-1466, 1473-1475, 1752-1754
Sale of Automatic Washer Stock Investment Letters	Ct. Ex. 169, pp. 746-747; Ct. Ex. 171, p. 3856	[M] Tr. 2985-2986, 3000-3014, 3176-3178, 3199-3206, 3382-3386 1-3***, 5-G-1 to 5-G-29, 5-G-31 to 5-G-62, 5-G-64 to 5-G-67
Sale of Automatic Washer stock—Change of circumstances	Ct. Ex. 171, pp. 3857-3858	[M] Tr. 9327-9330, 5-U-1, 1-3, 8-E-1 to 8-E-33A
Standard Industry Stock —Berk & Co.	Ct. Ex. 170, pp. 3343-3344	5-G-79
Pierce Governor Stock —Investment Letter	Ct. Ex. 171, p. 3845	[M] Tr. 3233-3238, 3256, 3258-3259, 3364-3365.

**Defendant's exhibit numbers.

***Government's exhibit numbers."

Although not above listed, Abrams testified fully as to the Witkin defalcation (Ct. Ex. 170, pp. 3358-9).

It is noteworthy that when Abrams was being examined at SEC, he inquired of the hearing examiner what connection there was between Automatic Washer, Bellanca and the other names mentioned (Gov. Exh. 169 at p. 800), to which SEC counsel Moss replied:

> "These are all integrated transactions; they all occurred at the same time; it was *all part of the same transaction wherein Nelson was put into Automatic,*" * * * (p. 801)

The government made the identical claim at the trial below. Evidence relating to all of the matters inquired into by SEC counsel Moss in July 1957 was introduced and admitted under the conspiracy count. The production of the subpoenaed documents at that SEC hearing, all of which related to the same matters, was duly noted.*

On October 1, 1957 Mr. Abrams was again subpoenaed, this time before Mr. Goldman. We quote what occurred at that time in a column parallel to the quotation by this Court from the record in *Smith* v. *U.S.*, 337 U.S. 137 [1949] because the two situations are so startling alike (see p. 56, *infra*).

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* *"By Mr. Moss:*

Q. At this time, Mr. Abrams— A. Yes.
Q. —you received a subpoena duces tecum? A. Yes.
Q. From the Commission. A. Yes.
Q. Did you produce the books and records required by the subpoena? A. I did.
Q. Can they be given to the Hearing Examiner at this time, please? A. Surely.
Hearing Examiner: They were subpoenaed on behalf of the Division; I will turn them over to the Division." (Court Exh. 169, at pp. 749-50)

Court Exh. 170, at pp. 3324-5

"Mr. Goldman: . . . Let the record show that Mr. Abrams appeared here on June 19, 1956, June 21, 1956 and July 5, 1956.

As you will recall, Mr. Abrams, you took the Fifth Amendment with respect to the more substantive questions I asked you on those occasions. I want the record to show that Mr. Abrams appears here voluntarily with the understanding that he is not going to plead the Fifth Amendment. *I use the term 'voluntarily' not in its usual context.* As you understand, *you are still under subpoena, Mr. Abrams?*

Mr. Abrams: Yes.

Mr. Goldman: I want the record to show that this arrangement was volunteered. *As you know, you still have the right to refuse to answer* any questions on the grounds that it may incriminate you or subject you to fine, penalty or forfeiture. *I do not want to create a situation here where you are being forced to waive your right to plead the Fifth Amendment.* I take it here that you are represented by Mr. Ganson Purcell as your counsel?

Mr. Abrams: That is correct.

Mr. Goldman: Under these circumstances, I take it you are willing to testify?

Mr. Abrams: I am, sir.

Mr. Goldman: Would you be good enough to take the oath?"

Smith v. U.S., at pp. 144-5

"Question: *This is a voluntary statement. You do not claim immunity with respect to that statement?*

Answer: *No.*

Question: I assume that anything you tell us, Mr. Smith, is subject to verification? You state that after a time Metals Disintegrating Company, although it had a contract with the government, was not in a position to furnish you with the materials necessary for Daisart to manufacture this item?

Answer: Right?

Question: And that because of that situation, Daisart was required to obtain priorities so that Daisart could obtain the materials and that it did so?

Answer: In a blanket amount.

Question: And that pursuant to that priority, Daisart thereafter acquired materials, some of which were used in the manufacture of ammunition bags for Metals, and some of which was disposed of by Daisart, is that correct?

Answer: Yes.

Question: And those disposals by Daisart formed a good part of the sales of fabrics made by Daisart?

Answer: They did."

In *Smith* this Court reviewed a determination reversing a conviction on twelve counts because defendant "had not waived immunity in respect to his earler disclosure" but affirming on other counts on the basis that defendant had "voluntarily waived all immunity on the facts therein stated" (337 U.S. at pp. 145-6). The Government con-

tended that defendant's "immunity from prosecution on facts concerning which he was compelled to testify was waived by a subsequent voluntary statement" (337 U.S. at p. 149). The "voluntary" statement is that quoted above from the text of the opinion (337 U.S. at pp. 144-5, 149-150). This Court ruled that "[p]rivilege can be waived and with the waiver the statutory immunity disappears" because "the purpose of the remission of penalties is to force out evidence that is protected by privilege against self-incrimination; a waiver of that protection makes the testimony available for prosecution of the witness" (p. 149). The Court added, "[n]or do we see any reason why claim of privilege to all or any part of testimony may not be withdrawn". However, observed the Court, "[a]lthough the privilege against self-incrimination must be claimed, *when claimed it is guaranteed by the Constitution,*" *and* "*[t]hereafter only absolute immunity from federal criminal prosecution is sufficient to compel the desired testimony*" (p. 150). The Court then held, on the record strikingly identical to that here presented, as we have demonstrated by our parallel quotations, that the ruling below was erroneous in holding that the defendant had waived his immunity.

We contend that since petitioner Abrams obtained immunity from prosecution by his testimony and production of documentary material at the hearing conducted by SEC counsel Moss on July 24, 1957, he then no longer had any basis for claiming his Fifth Amendment privilege against self-incrimination at the subsequent hearing on October 1, 1957 conducted by SEC counsel Goldman. By then it was clear that Abrams had "relied from the beginning" at these SEC interrogations "upon his privilege" (*Smith,* p. 150). Although SEC counsel Goldman at the October, 1957 hearing wanted the record "to show that Mr. Abrams appears voluntarily with the understanding that he is not going to plead the Fifth Amendment" he specifically

noted that "I use the term 'voluntary' *not in its usual context"!* Indeed, he further advised Abrams *"I do not want to create a situation here where you are being forced to waive your right to plead the Fifth Amendment"*. It is in that very context that SEC counsel observed that "under these circumstances I take it you are willing to testify", to which Abrams replied "I am, Sir" (Court Exh. 170, at p. 3324; p. 56, *supra*). Obviously, he had no choice since he had already acquired immunity.

Manifestly, there was no indication nor suggestion that Abrams' "voluntary" appearance was intended to be a waiver of the immunity that had resulted from his appearance at the July 1957 hearing at which, as already noted, he gave full testimony and produced subpoenaed documents. Nor can Abrams' testimony at the October 1957 hearing be deemed a waiver of the immunity that necessarily resulted from that hearing as well, notwithstanding Abrams' "voluntary" appearance thereat. If such were the purpose, it was incumbent upon SEC counsel to make that indisputably clear. No such inference may be drawn in view of SEC counsel's advice that he was using "the term 'voluntary' *not in its usual context"* and that he did "not want to create a situation here" where Abrams was "being forced to waive your right to plead the Fifth Amendment" (Court Exh. 170, at p. 3324; p. 56, *supra*). Understandably, "under these circumstances" Abrams was "willing to testify" (*id.*).

Even if the circumstances can be held to be equivocal, and they are not, petitioner's "voluntary" appearance and his testimony under these circumstances cannot be "a waiver of the previous definite claim of general privilege against self-incrimination" (*Smith, supra,* pp. 150-151). SEC counsel could not claim ignorance of this Court's holding in *Smith.* Indeed, SEC seemingly with a view to this type of problem promulgated a special rule which charged its staff to consider carefully the resultant immunity that a

prospective interrogation may bring about. The reasons for the regulation (noted below*) alerting SEC attorneys are set forth in a comprehensive article in *72 Yale Law Journal 1568,* entitled *"The Federal witness immunity acts in theory and practice: treading the constitutional tightrope."*

If it were intended that Abrams' "voluntary" appearance, a term admittedly not employed in its usual context, was designed to bring about a waiver of his constitutional privilege, SEC counsel should have made that clear in plain, unequivocal language. Short of that, as *Smith* makes clear, is insufficient to bar the resultant immunity (Court Exh. 170 at p. 3324).

Neither the lapse of time between the date when the privilege against self-incrimination was first asserted (June, 1956) and the service of the second subpoena (July, 1957) by which Mr. Abrams was compelled to appear and testify, nor the setting in which such compulsory testimony was subsequently taken, served to bar or obliterate the immunity with which he had become invested.

U.S. v. *Harris,* 334 F. 2d 460 [2 Cir. 1964], reversed on other grounds, 379 U.S. 944 [1965], holds that the immunity with which a witness compelled to testify becomes invested, "extends to all testimony thus compelled, insofar as that testimony bears a substantial relation to the subject matter of the immunity provision." Moreover, the fact that such

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* 72 Yale Law Journal, p. 1607, footnote 157 quotes the regulation:

"157. When a witness makes a claim of privilege in response to a question, SEC investigators *are directed to read the following statement into the record*:

I am not presently authorized by the Commission to compel you to give evidence as to which you claim privilege against self-incrimination and I have no such intention. Any questions that I might hereafter ask you will be with the understanding that, if you claim privilege, you need merely state that you refuse to answer on the ground that your answer may tend to incriminate you or subject you to penalty or forfeiture. In other words, if you answer any question, you are doing so voluntarily. Do you understand that?"

"testimony may be relevant not only to the specific provision" upon which the "investigation is based but as well to other criminal provisions, poses no dilemma for the prospective witness" and "[m]oreover the witness compelled to testify" also "enjoys immunity as well from the use of that testimony by the prosecutorial agencies of state governments" (p. 462). See also *Reina* v. *United States,* 364 U.S. 507, 81 S. Ct. 260, 5 L. Ed. 2d 249 (1960); *U.S.* v. *Tramunti,* 343 F. 2d 548 (2 Cir. 1965); *U.S.* v. *Charles Pfizer & Co.,* 246 F. Supp. 801 (S.D. N.Y. 1965).

There is no legal basis for urging that the time and setting of these interrogations, which were entirely within the control of these officials serving the same agency, should operate *to place the burden upon a prospective defendant* to see to it that all officials before whom he is compelled to appear are advised as to what occurred on any prior occasion. Recent decisions (*Harris, Tramunti* and *Charles Pfizer, supra*) place no such burden upon the individual who is compelled to appear and testify at diverse times and places (see *Jones* v. *United States,* 342 F. 2d 863, 867, 868, D.C. Cir., 1964; *Seals* v. *United States,* 325 F. 2d 1006, D.C. Cir., 1963, cert. denied, 376 U.S. 964 [1964])

The post verdict affidavit of Mr. Moss cannot overcome the fact that the official record of the proceeding that he himself conducted, makes it clear that Abrams received immunity as to the matters covered therein.

In opposition to the post verdict motion, *although no affidavits were submitted by petitioner on the issue of immunity,* the Government interposed the affidavit of Mr. Moss, SEC counsel, sworn to July 10, 1964, in which he purports to set forth facts contrary to those revealed by the official record of the very proceeding that he himself conducted and on the basis of which it is claimed Mr. Abrams received immunity (A158a-60a).

Government counsel acknowledged at the trial that the question was one of law and was to be answered "simply by a careful and common-sense reading of these transcripts" (M8487). *United States* v. *Harris,* we submit, makes it clear that when Abrams was required under the compulsion of the second subpoena to testify and to produce documents at the proceeding conducted by Mr. Moss, he thereby acquired immunity as to all matters which were the subject of that interrogation, and which admittedly were basic to this prosecution. Mr. Moss' affidavit, as matter of law, could not obliterate the immunity so acquired or even suggest that an issue of fact can exist in the face of the official transcripts. See *U.S.* v. *Charles Pfizer, supra.*

If Government counsel has a legitimate basis for urging that the Moss affidavit should be considered here, we submit that that constitutes reversible error because defense counsel was given no opportunity to try any issue raised by Mr. Moss' affidavit, nor afforded the opportunity to cross-examine Mr. Moss or to produce competent evidence on any issue sought to be raised by him in affidavit form.

The defense of immunity was properly and timely raised on the trial, and petitioner Abrams was not required to raise this point upon pretrial motion; this defense could not have been evaluated, or even properly raised, before the trial was in progress.

The Government contended below that immunity should have been claimed by pretrial motion and that failure to do so was a waiver of that defense (M8490); Judge TYLER although voicing "grave doubt that this motion is timely made," decided "at least for the purposes of your record to go to the merits" (M8909). It has been held that immunity may be asserted during trial under defendant's plea of innocence. See *United States* v. *Weinberg,* 65 F. 2d 394; *Smith* v. *United States, supra,* at p. 145.

Logic compels the conclusion that the defense of immunity could not have properly been raised on pretrial mo-

tion, but only during the course of the trial as the prosecution introduced its evidence. The hearing on which Abrams received immunity was entitled: *Matter of Bellanca Corporation;* the indictment in this case purported to relate to dealings in the stock of Automatic Washer Company. Clearly, before the trial began, a motion to dismiss the indictment on the ground that immunity had been acquired with respect to matters covered therein would have been denied (See *Costello* v. *United States,* 350 U.S. 359 (1956); *United States* v. *Tolub,* 187 F. Supp. 705 (S.D. N.Y. 1960); *United States* v. *Dierker,* 164 F. Supp. 304 (W.D. Pa. 1958). It was only after the defense could review the evidence presented, that it could be determined that the subject matter of this prosecution was the same as that to which Mr. Abrams had previously received immunity and that the transactions involved were identical. When this point was reached, the defense of immunity was promptly and timely raised.

If doubt existed that the defendant obtained immunity under 15 U.S.C. §77v(c), that doubt must be resolved in his favor; the courts have consistently construed immunity acts in favor of the individual.

If there are any individual rights to which this Court has given preferred treatment they are: the right to freedom of utterance under the First Amendment; and the privilege against self-incrimination under the Fifth Amendment. Time and time again the courts have sustained claims of the privilege against self-incrimination. See Rogge, *The First and the Fifth,* 187-89 (1960); Rogge, *Compelling the Testimony of Political Deviants,* 55 Mich. L. Rev. 375, 402-04 (1957).

Under 15 U.S.C. §77v(c) the courts have been liberal in finding that an individual claimed his privilege. See *United States* v. *Goodner,* 35 F. Supp. 286 (D. Col. 1940); *United States* v. *Eisele,* 52 F. Supp. 105 (D.D.C. 1943). Cf. *Marcus*

v. *United States*, 310 F. 2d 143 (3 Cir. 1962), cert. denied 372 U.S. 944.

The basis of the prosecutor's opposition to the granting of the motion to dismiss on the ground of immunity was that "the invocation of the privilege in one proceeding does not carry over to a later proceeding. And there is no authority to our knowledge the other way" (M8488). This of course completely overlooked the principle of *U.S.* v. *Harris, supra,* and *U.S.* v. *Tramunti, supra,* wherein the Court emphasized that the scope of the immunity obtained by testifying under compulsion is measured by the scope of the testimony obtained, irrespective of the title of the proceeding or the law or statute under which a particular inquiry is conducted (*Cf. United States* v. *Shillitani*, 345 F. 2d 290, 293 [2 Cir. 1965]).

This Court's ruling in *United States* v. *Monia*, 317 U.S. 424 (1943), should be a due process right applicable to every type of compulsory testimony provision.

United States v. *Monia*, 317 U.S. 424 (1943), held that under the older form of compulsory testimony provision, a witness obtained immunity from prosecution even though he had not claimed his privilege against self-incrimination. This ruling should be a due process right applicable to every type of compulsory testimony provision.*

As Chief Justice Warren in *Coppedge* v. *United States*, 369 U.S. 438 (1962), cautioned, "when society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps" (p. 449) and to that end, the consistent policy of this Court as reflected in its most recent decisions is to remove the undesirable unconstitutional

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* See Rogge, *Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations—I*, 47 Minn. L. Rev. 939 (1963); Rogge, *Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations—II*, 48 Minn. L. Rev. 557 (1964); Rogge, *Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigation—III*, 48 Minn. L. Rev. 1081 (1964).

remnants of the "inquisitorial system of criminal justice" *Griffin* v. *California,* 380 U.S. 609, 614, 14 L. ed. 2d 106 (1965) quoting *Murphy v. Waterfront Comm'n,* 378 U.S. 52 [1964].

4. *Due process demanded that the defense of the statute of limitations be submitted to the jury; the gravity of the error in that respect is highlighted by the complete absence of possible criminal intent in connection with the transactions involved.*

(a) Count 1, charging petitioners with mailing certificate No. CU1601 on or about April 2, 1956 for 1000 shares of Automatic to one Joseph R. Baradel "for the purpose of sale and for delivery after sale", was dismissed at the close of the Government's case as barred by the statute of limitations (A24a; M7615-35, 7931*).

Ten counts of the indictment (2 through 11) involved a single certificate, TCU 750, for 1000 shares of Automatic stock purchased from petitioners by Eugene Carusi, an attorney, on March 14, 1956 through the brokerage firm of Hentz & Co. at $3 a share (M1992-9; Gov. Exhs. 5-G32/33/34) and thereafter allegedly sold on April 24, 25, 26, 27, 30, May 1, 2, 3, 4 and 7, 1956, *in units of one hundred shares* on each respective date. Each sale was made the subject of a separate count (A45a). All but counts 2 and 11, the *first* and *last* of these sales made within less than two weeks, were severed (A45a; M59).

To prove these counts, Eugene Carusi, a member of the Bar of Washington, D. C. for more than thirty years, was called as a witness *"by the Court"* (M1990, 2021). Carusi

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* The indictment was found and filed April 3, 1961 (Ala). The statute of limitations here involved (18 U.S.C.A., §3282) bars prosecution by indictment found and filed more than "five years next after such offense shall have been committed".

had known Abrams, a former client, for about fifteen years. Carusi, a graduate of Annapolis, served in the Navy in World War II (M2021); the Court did not permit him, because of Government objection, to specify in what capacity he served, nor whether he received any citations (M2021-2). He was connected with the Department of Justice until 1937 or '38; Government objection foreclosed testimony as to the length of service or its nature (M2023).

Carusi said Abrams advised him Automatic "was a good buy at the price that I could buy it for" (M1993). He subsequently sold the stock on the dates as above noted and testified on direct, "It was sold at my order" (M2003). The prosecution also adduced that the stock had been sold at a time when *"there had been some arguments which became rather heated between Abrams and Mr. Albert"* (M2003). *Thus Abrams and Albert were already in hostile disagreement from and after the early part of March of 1956.* We reemphasize that Bankers Life took and remained in control of Automatic on and after May 8, 1956 (M1377-92, 1395-1402, 2766-9, 2782-93, A622a-3a, Gov. Exhs. 5-Q-1, 5-Q-2, Gov. Exh. 3-13; M1045).

Carusi testified positively that this block of stock *was his* and the decision to sell likewise *was his own* (M2061-65) and that "there did come a time when *because of outside events I decided that this stock should be sold"* (M2063). Carusi testified unequivocally that he himself made the determination to sell. Abrams was not then selling, nor did he tell Carusi that he was selling, in order to induce him to do so (M2064). Of controlling impact, was Carusi's testimony, corroborated by attorney Francis Purcell (M9290-4), that this block of stock was *"free stock"*, not subject to any statutory impediment so far as sale was concerned. Carusi admitted that he was told by Abrams that the latter was "getting this block of [free] stock from

Mr. Purcell" (M2044, 2058-60).* Carusi sold his stock through Berk & Co. at prices ranging between 7 and 8⅛ (M2065-6; Gov. Exh. 5-G-35). *Carusi retained the full profit* (M2066); although he admittedly received Abrams' advice and aid in diverse stock transactions including these, Carusi testified unequivocally that Abrams did not control his account (M2039). Abrams did not participate either directly or indirectly in the proceeds; indeed, Carusi asserted without qualification that he did not act as dummy for Abrams in these transactions (M2066).

There was no justification to place Mr. Carusi in the category of a "court witness" (M1987-8); that only serves to accentuate the error in the trial Court's rulings excluding evidence as to this witness' honorable military service and professional status (M2021-3, 2027-8).**

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* CARUSI TESTIFIED: "Q. The fact is, is it not, that before that block of 1,000 shares was acquired by you, Mr. Abrams told you that he was to receive 5,000 shares of such stock from Frank Purcell, who was the attorney for Automatic, isn't that correct? A. Yes. I already answered that" (M2059). PURCELL TESTIFIED: "When the Washer-Dryer Corporation was dissolved and I received the 25,000 shares of Automatic Washer stock I immediately offered 5,000 shares to Joe Abrams and 5,000 shares to David Shindler" (M9292), * * * "As to the status of these shares. I told them that this was a transaction covered by Rule 133 under the Rules and Regulations under the Securities Act of 1933, and, as such, this stock had no impediment in my hands or in theirs as far as trading was concerned, selling it through a broker in the open market, no restrictions whatsoever" (M9293).

** "THE COURT: Our only difference, Mr. Gottlieb, it is a matter of degree. It seems to me you would not dispute that the trial court has some discretion here and in my discretion I feel that though you are certainly entitled to bring out that though this man is a lawyer and has been engaged in practice for a long number of years and he has had certain public service, fine, I am all for that. But I am not for these underhanded attempts to kind of cotton up to the jury with sympathy like whether or not he has a silver star or maybe more likely a theatre ribbon which doesn't amount to a hill of beans.

MR. GOTTLIEB: But your Honor bypasses the very essential point, when a witness is presented by the government of the United States as to be so lacking in credibility that they cannot call him as a government witness, and I have argued that before, the fact that he has an honorable service record is not only an

The testimony of Carusi, a responsible member of the Bar, and, it may properly be stressed, who had honorably served this country in military as well as in civil service, negates, as matter of law, the Government's charge that there was intended an illegal sale of unregistered stock. The Court's charge to the jury as to these counts was erroneous in its presentation of that issue (A330a-1a*); the *prosecution's ultimate theory was that Abrams' sales to other than members of his family were sales to the "public"* (M11676-7; 11869). The evidence clearly and convincingly established that Carusi purchased this block of 1,000 shares of Automatic on March 14, 1956; that it was "free stock" as he was advised and as was attested to by Mr. Purcell, former Regional Administrator of the New York office of SEC (M9273), citing Rule 133 of the *Rules and Regulations* of the *Securities Act* of 1933.

The prosecution's dilemma was further evidenced by its suggestion that Richland was "an aider and abettor of this

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essential fact but a proper fact in order to establish his status. If he has a ribbon, that is important too. I didn't bring out his background. If they simply called him as a witness and made no comment about his stature I would admit I have no right and I would have no intention to ask most of the questions that I did on that subject.

They have rejected him and I want to show they have no right to reject him, because his whole life history shows the man is worthy of credibility." (M2027-8)

* The Court charged: "Further, it is the government's theory here that Carusi was a conduit who, though he gave an investment letter, actually was used by Abrams and Richland to sell out, notwithstanding such letter. The defendants involved dispute this and claim this was a bona fide transaction and that Carusi sold for reasons of his own and did not intend to sell, so far as the defendants knew, to the public when he first acquired his shares of Automatic Washer" (A331a).

There was no proof that Carusi "gave an investment letter". The Court was in error in referring to an investment letter, as the prosecution itself pointed out (M12033-4) and which the Court subsequently undertook to correct (A424a-5a). There was no occasion for any investment letter since this was free stock. Indeed, Judge TYLER had acknowledged "there is no dispute but that Mr. Purcell sold Mr. Abrams 5,000 shares" (M10989). Such, indeed, was Mr. Purcell's undisputed testimony (M9290).

transaction" (M7640), a theory cognizable only on the basis that Carusi intended to become and was himself involved in the alleged illegality. No such theory was ultimately submitted to the jury (A331a, A424a-5a). Wholly apart from the applicability of the statute of limitations now to be discussed, the record as established by the Government's own testimony was insufficient as matter of law to establish these indictment counts and petitioner's motion for an acquittal should have been granted (M10985-6, 10995).

Since Carusi purchased this block on March 14, 1956, prompt objection was made upon the ground that the statute of limitations (18 U.S.C.A. §3282) was a bar (M1996, 1999). George C. Seifried, employed by SEC after 33 years in Wall Street in various brokerage firms (M235-6), testified that stock certificate TCU-750 was originally registered in the name of Richland (M436-7) was transferred on March 20, 1956 to Hentz & Co. The old certificate TCU-750 was cancelled and a new certificate issued on March 20, 1956 (M437-8). The stock was paid for on March 14, 1956 (M2037, 2161).

Judge TYLER's ruling dismissing count 1 as barred by the statute of limitations (M7615-35, 7931) thus applied here. The Government, realizing the force of our argument (M7640) contended: "on the whole record it would appear there is ample evidence by which this jury could infer Carusi was acting as a nominee" (M7641), but argued to the contrary on summation.*

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* Government counsel (Mr. Armstrong) argued: "We do not claim that Mr. Baradel or any of the other people in this group represent dummy accounts. We represent that Mr. Baradel and the other members of this group were the public. This was the public. Joe Abrams was selling directly to the public. * * * So that it is not a question of trying to say that Baradel is a dummy or controlled by Abrams, we don't say he is. As a matter of fact we mean exactly the opposite." (M11676; A8a). Government counsel (Mr. Armstrong) stated in summation: "But we don't rely on that theory. We don't say that Joe Abrams aided and abetted Eugene Carusi selling the stock" (M11703); later the Government contended *"that Mr. Carusi, since he was not a relative, didn't fit in that group"* (M11869).

Government counsel although contending that the sale to Carusi was a sale "directly to the public" (M11676) made it clear that "we do make this allegation" *where "relatives were involved.* There we say that Joseph Abrams did use *his relatives* as dummies and that they were just figures that he manipulated" but "with this particular group", that is to say, Baradel, Carusi and other non-relatives "I have been talking about, it is a different matter" (M11676-7; 11869). Shortly before the prosecution stressed "that Mr. Baradel and the other members of this group were the public" (M11676).

As to the accounts relating to Abrams' relatives, allegedly "dummies", it may be stated here parenthetically, the jury's verdict of *"not guilty"* was a rejection of the Government's theory (A26a). It will be clear that the verdicts of guilty relating to sales to the "public" resulted, as we hereafter demonstrate, from an erroneous charge which gave the jury no alternative. Carusi, in a legal as well as in a colloquial sense, was of course a member of the "public" and the sale by petitioners to him of this block of stock on March 14, 1956 was therefore in that sense, as the Government argued, a sale "directly to the public".

But wholly aside from these considerations it was a denial of due process not to submit the defense of the statute of limitations to the Jury. Judge TYLER's attention was specifically directed (M10960-2), to *U.S.* v. *Connor,* 237 F. 2d 466 [1956] holding that a "defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be." (p. 474, note 8). *A fortiori* was that principle applicable here, since the Government urged the existence of an issue of fact involving the defense of the statute of limitations (M7640-1). Recently *Byrd* v. *U.S.,* 342 F. 2d 939 (D.C. Cir. 1965) held that the omission to instruct the jury on every essential

element of the crime was plain error since it deprived the defendant of the "substantial right to have the jury pass on every essential element of the crime" whatever the evidence (pp. 941-2); see also: *Peterson* v. *U.S.*, 344 F. 2d 419, 428 (5 Cir. 1965).

The prosecution of these counts and other counts as well, as matter of law, was barred by the statute of limitations (18 U.S.C.A. §3282). *Carroll* v. *U.S.*, 326 F. 2d 72, 85, 86 (9 Cir. 1963) is in precise application here. *Waters* v. *U.S.*, 328 F. 2d 739 (10 Cir. 1964) holds that the statute of limitations is to be liberally interpreted in favor of the accused.

When defense counsel argued that "the Court's refusal to submit to the jury the defense of the statute of limitations" was "fatal error" (M10960) because "these transactions which were the subject of these counts so far as Mr. Abrams was concerned, terminated in March", the Court clearly understood the impact of that contention.* The Court nonetheless refused to instruct the jury on the defense of the statute of limitations** notwithstanding that specific attention was directed to *Connor, supra,* which in unmistakable language stated a "criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence" (M10960).

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* "The Court * * * However, I do intend to start off with some particularity with the government theory and your defenses here and make it as clear as I know how in simple layman's language that the government frankly cannot prevail as to these counts if the only sale that is found is the one in mid-March, going into these family accounts which are the subject of those counts that you have just enumerated. I can't imagine a plainer and simpler way to put it, and if I don't use the lawyer's magic words, which lawyers love to use, the statute of limitations, I submit that is of no great consequence." (M10962)

** "THE COURT: You are saying you have got a good jury question. I would agree with you but that is a horse of a different color. I want to answer you flatly so your answer is clear. I don't intend to submit, so far as your client is concerned, any statute-of-limitation issue of fact" (M10539)

(b) According to the bill of particulars, counts 12 through 21 involved stock certificates TCU-747, TCU-752 and TCU-753 (A66a). The jury found petitioners *"not guilty"* on counts 12, 13, 14, 15 and 16; and *"guilty"* on the remainder of these counts (A26a; M12205-6). For reason soon obvious, it is essential to make brief reference to the record concerning the counts on which verdicts of innocent were rendered.

Count 12 involved Dr. Raymond Abrams, Joseph Abrams' brother. As already noted, the prosecution claimed that he was one of the relatives allegedly acting as Abrams' "dummies". The jury's finding to the contrary, by their not guilty verdict becomes important in evaluating the contentions now discussed.

Dr. Abrams, a radiology specialist, a visiting professor at the New York University School of Medicine and an attending physician at Bellevue Hospital, called as a "court witness" (M2441), testified that he purchased 1,000 shares of Automatic at $3.00 per share on March 14, 1956. They were delivered into his account at Berk & Co. by his father (M2443) and paid for by check (M2444). In contrast with the transaction involving Mr. Carusi who, as we have indicated, purchased *free stock,* Dr. Abrams signed an investment letter (M2452; Gov. Exhs. 5L1-2). He relied on his brother's judgment with respect to stock and security investments (M2458). He did not resell his shares until May 1956 at which time they were sold through Hentz & Co. as follows: May 28, 1956 at 5⅝—100 shares, May 31 at 5⅛—100 shares, June 1 at 5⅛—100 shares, June 4 at 5—100 shares, June 6 at 4¼—100 shares, July 6 at 3⅝—100 shares, July 10 at 3¾—100 shares, July 11 at 3⅝—100 shares, July 13 at 3¼—100 shares and July 16 at 3¼—110 shares; the 10 shares represented a stock dividend (M2469-70; Gov. Exh. 5-G-22, App. Exhs. DAR AJ/AK). Count 12 of the indictment only specified the sale of May 31, 1956 (A45a; M1941) although all of the other sales made by Dr. Abrams

were, as above noted, introduced into evidence. Dr. Abrams testified that from what he learned about the financial affairs of the company in May, he decided to sell and had been advised by his attorney he could lawfully do so (M2459-66). He testified, however, that his brother, "told me not to sell them" (M2467). The small profit that Dr. Abrams made was reported on his personal tax return (M2468).

The defense of the statute of limitations was promptly raised as to these transactions (M2445) *but that defense was not submitted to the jury. It necessarily follows that the jury's exoneration on this count* (A26a) *was a negation of the Government's claim that Abrams set up these "accounts in the name of his relatives and used them in the course of a general distribution to the public in violation of law"* (M11729), *and, "that Abrams himself manipulated the accounts" of the members of his family "as conduits for purposes of sale of stock to the public"* (A326a).

Counts 13, 14, 15 and 16 involved Emanuel Abrams, father of appellant Joseph Abrams (M11941-2, 11715, 2645-50, 8378; Gov. Exhs. 5-G-14/16). At the time of trial Emanuel Abrams was deceased (M11715, 8378). His brokerage account was opened on January 25, 1955 (M8378). On March 14, 1956 more than a year later he bought 1,000 shares of Automatic at $3.00 per share from petitioners (M2645-50, 8378; Gov. Exhs. 5-G-14/15/16). He also bought 100 shares in the open market (M8378-80). He resold the entire block of 1,100 shares in the period between June 19, 1956 and July 6, 1956 (M2700-1). He too was one of the family members charged with being a "dummy" and a "condit" (M11677, 11715, 11930, 11935).

Since the defense of the statute of limitations which was promptly raised (M2647) *was not submitted to the jury, the jury's verdict of not guilty on these counts was again*

a rejection of the Government's contention that Abrams' father was a "dummy" and "conduit" (A26a; M12205-6).

Counts 17, 18, 19, 20 and 21, according to the bill of particulars treated with certificate TCU-747 for 1,000 shares of Automatic bought from petitioners at $3.00 per share by Mrs. Edna Gwosdow, Abrams' sister (M2487; A66a). She was called as a "court witness" (M2486). Her brokerage account was opened on June 8, 1955 (M8401). By letter dated March 9, 1956 that certificate was sent to Mrs. Edna Gwosdow c/o Ben Berk & Co., 60 Beaver Street, New York City (Exh. DAR-AM). The Hentz & Company records show that the shares went into Mrs. Gwosdow's account on March 14, 1956 (M2487-8; Gov. Exh. 5-G-47). Certificate TCU-747 was cancelled on March 20, 1956 and a new certificate issued (M438, 8152-6). The stock was paid for by two checks (M2489-90; Gov. Exhs. 5-G-48-49); Mrs. Gwosdow signed an investment letter dated March 8, 1956 when she bought the stock (M2491-3; Def. Exh. DAR-AM, M2524). The Gwosdow account reflects that resales of the stock were made by her from July 6 to July 16, 1956 (M2488-94; Gov. Exh. 5-G-47). Mrs. Gwosdow testified that she herself ordered the stock to be sold and personally gave the instructions in that respect (M2494-6); she did not consult her brother about selling the stock; in fact, "he was not available at the time" (M2495).* No one but she had the authority to give such orders (M2498-9). Ultimately, as she testified, she reported the profit of $302.65 realized on the sale, in the joint tax return of herself and her husband filed in April 1957, three years before she was even questioned about the matter by any SEC representative (M2515-9). No part of the proceeds or profit was given to her brother, appellant Abrams (M2519-20); he did not ask her to nor

* As the unimpeachable documentary evidence demonstrates, appellant Abrams was out of the country in the Virgin Islands from July 12, 1956 to July 25, 1956 (M9227-8, 9250; Exh. DAR-CL).

did she act as his dummy in the transaction (M2521-2, 2540). All this testimony was adduced on the Government's case. The defense actually did establish without dispute (M9208*) through the attorney who handled the transaction, that the proceeds were used by Mr. and Mrs. Gwosdow to buy a drug store in September 1957 (M9211-9217); *at which time her brokerage account was closed* (M9047)! The Court charged the jury, however:

> "Counts 17 through 21 involves alleged sales of Automatic Washer, 100 shares for each count, *out of the Charles Gordon account* on July 6th, 10th, 11th, 13th and 16th of 1956" (A332a).

The confusion presented by the Court's charge and the record in this respect stems from the Court's refusal to have the prosecution key the testimony to the specific counts in the indictment, a request made at the very outset of the case and made repeatedly thereafter (M977-978**; see also

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* "MR. TEPPER: The purpose of the offer, your Honor is to show that the money in the Hentz account, which the government claims was actually Joseph Abrams' account, was used by Mrs. Gwosdow; along with the money of Henry Montour, was turned over to an attorney who was to use it to buy a drug store for Mr. and Mrs. Gwosdow.

The Court: I never dreamed that the government was contending that this particular account or, as far as I know, any of these other accounts, that the money was used otherwise. I understand that Mrs. Gwosdow has already testified to that.

MR. TEPPER: The government so contends, that these were dummy accounts" (M9208).

** Defense counsel after stating to the Court "so far we are trying every other collateral transaction in this case" made this specific request: "I respectfully ask the Court, first, to direct government counsel to prove the indictment counts so that we will know when and if it is conceivably possible that any of these matters may be appropriate, even as background, much less of any effect upon this jury, because at this time I would not blame the jury for believing that they are trying the Nelson transaction, they are trying the Bellanca transaction, they are not trying a single count contained in this indictment. Therefore, I ask the Court, first, in order not to completely distort the presentation of the government's case and the issue which this jury is to try, that at least government counsel proceed with the indictment counts. They are very narrow in scope and at least we will know

M2080, 1949-51, 1882, 2724, 2736, 8258-78). Neither the indictment nor the bill of particulars keyed these counts to transactions involving Charles Gordon.* That is understandable since all counts involving petitioners *were severed as to Gordon before the trial on motion made by the Government* at the pretrial conferences (A12a; PM12150-1).** Indeed, the trial Court during the Government's case erroneously assumed that Charles Gordon "is deceased" (M2686); all counts against Gordon were ultimately dismissed (A289a).

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whether or not they can prove the sale of unregistered securities without safeguards." (M977-978)

The record further shows: "MR. GOTTLIEB: May I respectfully ask with respect to what substantive counts of the indictment are these identifiable with? THE COURT: Are you asking me to interrupt and have the government say this at this time? *I will say exactly what I said yesterday, Mr. Gottlieb, it is not necessary for them to do that in my opinion.*" (M1999)

Compare contrary view of HERLANDS, J. in his report at the Judicial Conference of the Second Circuit treating with the problems of long criminal trials (34 F.R.D. 156 at p. 174).

* The record shows:

"Q. Mr. Berk, will you be good enough to look at Government's Exhibit DAR-AM, and particularly the letter dated March 9, 1956, addressed to Mrs. Edna Gwosdow, care of Ben Burke & Company, which reads:

'There is enclosed herewith a certificate for 1000 shares of Automatic Washer stock number TCU-747.'

Now, will you be good enough to look at her records and see whether or not it reflects the receipt of those shares? And I show you Government Exhibit 5-G-47. A. Yes.

Q. Under what date does it appear that there was received into Mrs. Gwosdow's account 1000 shares of Automatic? A. March 14, 1956." (M8373-4)

As to Charles Gordon, Judge TYLER accurately portrayed the posture of the record as follows:

"The Court: * * * Who said a word as to what went on with the Charles Gordon account? I don't recall a soul mentioning it.

Mr. Gottlieb: Nobody." (M7651)

** "MR. ELSEN: Yes, I do have a couple of other matters. As to Mr. Gordon, the government will consent at this time to sever the case as to Mr. Gordon. THE COURT: Well, you have got your answer. The motion you are making is to sever as to the defendant Gordon. Those are what counts? MR. ELSEN: All counts as to which he is named as defendant. * * * THE COURT: That motion will be granted." (PM12150-1)

In any event Mrs. Gwosdow was a Government witness. Stock certificate TCU-747 was sent to her in care of her brokers on March 14, 1956 (Exh. DAR-AM).* This was verified by Government testimony and Government exhibits (M2487-8; Gov. Exhs. 5-G-47/48/49). Little wonder that defense counsel was in a complete dilemma and asked: "Does your Honor rule that despite DAR-AM I am now to argue on the assumption that TCU-747 referred to someone else than Mrs. Gwosdow" (M7662)? The startling response of the Court was "I can't construe the evidence for you for the purposes of your framing your arguments. That is the last thing I can do" (M7663). Defense counsel understandably was persistent in endeavoring to obtain clarification but was unsuccessful (M7663-4).**

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* The letter of transmittal to Mrs. Gwosdow specifically refers to the stock certificate by number: "There is enclosed herewith a certificate for one thousand (1,000) shares of Automatic Washer Company common stock, #TCU 747, together with properly executed blank stock power and Secretary's certificate, both guaranteed by the Franklin National Bank against a check for balance due of $3,000.00 (Exh. DAR-AM).

** "MR. GOTTLIEB: I don't want to appear to be stubborn, your Honor, but a motion that I must make to dismiss must be based on testimony referring to specific counts. If I am now in doubt as to whether that count refers to Mrs. Gwosdow as to whom there is a great deal of testimony, or Mr. Gordon, as to whom I claim there is none, I have no way of even raising it legitimately, a question of law, and I am precluded from legitimately arguing before the jury a question of fact. All counsel has stated to your Honor and the only justification there can be for the switch in numbers, and I can understand it, let me assume that they are accurate about it, that although the blotter receipt shows that this certificate TCU 747 came in as Mrs. Gwosdow's, Hentz & Company simply said 1000 shares in the name of Mrs. Gwosdow for Gordon or John Jones, or suppose they have a certificate by John Smith not connected with this case and they sold that off when Mrs. Gwosdow gave them the order, let us assume, to sell a thousand shares of stock, would they countenance an argument on my part because they sold Joe Smith's certificate Mrs. Gwosdow wasn't involved in the transaction? They would say that that is absurd because they treated them all as fungible. The reverse is equally true. If this is Mrs. Gwosdow's certificate, the only issue in those counts and in the bill of particulars therefore must relate to her, and if they undertook to treat them as fungible, that has nothing to do with the counts I am now arguing before this jury.

THE COURT: I don't agree with you" (M7663-4).

Defense counsel asserted: "if it is claimed that those accounts involve Charles Gordon, then I move to dismiss them upon the ground that the unimpeachable evidence shows that that certificate number, also referred to in the bill of particulars, has no relationship whatsoever to Charles Gordon, but was and is the property, as the documentary evidence proves, of Edna Gwosdow as to which she signed an investment letter" (M10980-1).

In petitioners' application for a bill it was pointed out that "[e]ach count of the indictment set forth the alleged offense in the most sketchy fashion and are not sufficent to give" petitioners "an opportunity to properly prepare their defense; more particularly since all of the alleged 'trades' were in 1956 approximately five (5) years ago" and moreover "[i]n Counts 2 through 21 which cover 'trades' on twenty (20) different dates there is no identification of the stock by certificate number." Identification of the certificate numbers was sought because "[w]ithout the necessary particulars it would be unsafe and improper for these defendants to be required to go to trial in this matter" (A60a). In recognition of the justice of that position Judge CASHIN directed the Government to supply "the serial number of the stock certificate mentioned *in each count*" (A61a, 65a; see *U.S.* v. *Murray*, 297 F. 2d 812, 819 [2 Cir. 1962; cert. denied 369 U.S. 828]; *U.S.* v. *Neff*, 212 F. 2d 297, 303 [3 Cir. 1954]).*

The failure of Judge TYLER to require the Government to key these trades to the substantive indictment counts, coupled with the Government's claim that the shares were "fungible" (M10981), thus completely nullified the purpose for which particulars were sought and which Govern-

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* *Murray*, citing *Neff*, said: "The function of a bill of particulars is to enable the accused to prepare for trial and to prevent surprise, *and to this end the government is strictly limited to proving what it has set forth in it*" (p. 819).

ment counsel recognized was "to alert the defense so they may be able to prepare a defense" (M10981). The Government doubtless determined to avoid having these counts keyed into the trades involving Mrs. Gwosdow. That is understandable in view of the testimony she gave, supported as it was by unassailable documentary proof. That was forcibly demonstrated on the motion made at the close of trial (10982-3*).

The trial Court did not give the jury any alternative as between Mrs. Gwosdow and Mr. Gordon in their consideration of these counts. The jury specifically requested a "list of relatives and friends which are associated on *each count* against Abrams, 2 to 21" (A427a).** It is not sur-

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* "MR. GOTTLIEB: First of all, I move to dismiss upon the ground that the transactions involving certificate TCU-747, so far as the basic documentary evidence is concerned, establishes beyond a reasonable doubt that they relate to Mrs. Gwosdow and I want to couple that with the further application that I move to dismiss all counts involving Mrs. Gwosdow upon the ground that the documentary evidence establishes that these brokerage transactions were her transactions and the proceeds derived from them were hers, and there is no issue which can be submitted to the jury on the basis of the theory expressed by the government in its opening. THE COURT: I don't agree with you. Denied. MR. GOTTLIEB: So that as far as Charles Gordon is concerned, if, on the other hand, they claim that that certificate relates solely and only to matters concerning Charles Gordon, I respectfully move to dismiss upon the ground that there has been no evidence at all that would be indicative of any act done by Charles Gordon, any intent upon Charles Gordon to violate the law, or that there is any proof that Mr. Abrams or Richland controlled the transactions in Charles Gordon's account. THE COURT: Let me stop you right there. I want to ask Mr. Elsen a question. What about the proof that either Abrams or Richland or both of them used the Gordon account as a conduit? MR. ELSEN: Your Honor, *the proof of that is circumstantial.*" (M10982-3).

** "THE COURT: Mr. Gault, I have the notes from you and your cohorts on the jury. Let me take up the second question first, which I understand to be a request for the names of those particular nine accounts for the so-called family or friends' accounts which are specifically related to counts 2 through 21. Is that right? THE FOREMAN: Yes. THE COURT: *You want to know which count refers to which?* THE FOREMAN: Yes. THE COURT:

prising since the Government presented its case in such a confused and diffuse fashion, that the jury asked whether they could "write it down" (A429a). This Court should note that the belated tie-in of the indictment counts to the specific member of the family or friend connected therewith was made with these subtle distinctions. In referring to counts 2 and 11, the Court's expression was that they refer to stock "*originally sold* to Eugene Carusi"; referring to count 12 the Court said that that "involves shares *sold out of* the account allegedly of Dr. Raymond Abrams"; then "count 13 is Emanuel Abrams" and "counts 14, 15 and 16 are also Emanuel Abrams"; finally "counts 17 to and including 21, Charles Gordon" (A429a-30a). The jury, as already indicated, acquitted on the counts involving shares thus "sold out of" the accounts of Dr. Raymond Abrams and Emanuel Abrams, petitioner's brother and father. Charles Gordon was his uncle. Government counsel, in summation, described Charles Gordon simply as "a severed defendant" (M11715). The record, as Judge TYLER acknowledged, was almost utterly devoid of reference to Gordon. Indeed, the Court thought he was dead (M2686); this bulky record contained so little that the prosecution ultimately resorted to the theory that guilt as to trades allegedly involving Gordon rested on *proof "that is circumstantial."* More important, from the trial Court's responses to the jury's inquiry, they evidently understood that Gordon was in the same category as Carusi, to whom shares were "originally sold"; indeed, even Judge TYLER seemingly forgot that Gordon was a relative.

I am not going to read you the exhibits, just the individuals. JUROR No. 2: That is right, sir. THE COURT: You go ahead. First of all, count 2 and then 11 that is, count 2 and then 3 through 10 are not in the case. 2 and 11 are each based on Automatic Washer stock allegedly *originally sold* to Eugene Carusi. That is counts 2 and 11. Count 12 involves shares *sold out of* the account allegedly of Dr. Raymond Abrams. Count 13 is Emanuel Abrams. Counts 14, 15 and 16 are also Emanuel Abrams. Counts 17 to and including 21, Charles Gordon" (A429a).

In referring to the fact that the relatives paid $3 for their shares, he commented: "We are talking only about the so called family group. We are not talking about people like Gordon, Shindler and others" (M7895).

Again wholly aside from the foregoing if certificate TCU-747 can be said to apply to Gordon, the evidence showed that it was cancelled on March 20, 1956 in accordance with the procedure that followed upon the making of sales to relatives and friends, all consummated in March 1956 (M438, 2665-70, 8150-1; Exh. DAR-CB). Petitioners were entitled to appropriate instructions that the Gwosdow trades may be considered, as an acceptable alternative to the countervailing contention of the Government that they related to Gordon; the refusal so to charge was error (A543a-5a*; 566a).

These counts should have been dismissed as barred by the statute of limitations, a contention promptly raised (M2645-7); in any event it was error not to submit that issue to the jury for, as already noted, petitioners were entitled to have the jury instructed regardless of the strength

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* Petitioners asked the Court to charge "40. If you find that the sale of 500 shares of Automatic Washer stock represented by Certificate TCU 747 referred to in counts 17, 18, 19, 20 and 21 of the indictment and in the bill of particulars filed by the Government represented a sale to Edna Gwosdow by Abrams or Richland or both which was completed in March 1956, then your verdict on counts 17, 18, 19, 20 and 21 of this indictment must be not guilty as to both defendants Abrams and Richland." "41. After Mrs. Gwosdow acquired the 1000 shares of Automatic Washer stock represented by Certificate TCU 747 on March 14, 1956, which certificate was thereafter cancelled on March 20, 1956, Mrs. Gwosdow testified that such shares were thereafter sold. If you find that Mrs. Gwosdow sold those shares as her own shares and for her own account and retained the proceeds thereof, then your verdict must be for acquittal of both defendants Abrams and Richland on counts 17, 18, 19, 20 and 21." (A543a-5a; 566a)

or weakness of the evidence with respect thereto* (*U.S.* v. *Connor*, 237 F. 2d 466, *supra*; *Byrd* v. *U.S.*, 342 F. 2d 939, *supra*; *Peterson* v. *United States*, 344 F. 2d 419, 428, *supra*).

Counsel vainly sought to have the Court instruct the jury as to the statute of limitations, specifically directing attention to these leading cases (A522a-3a).

The prosecution could advance no consistent theory as to these nine accounts, treated as a single uniform group in one instance (M7895), and split into two separate and distinct *groups* when obvious difficulty developed with that theory; thus *members of the family* in the latter instance were presented as *"dummies"* or *"conduits"* and the *non-relatives* were presented as members of *"the public"* to whom shares of Automatic were *"originally sold"*. Indeed, notwithstanding that Government counsel in closing told the jury "we do make this allegation as far as the dummy accounts with respect to the Hentz accounts *where relatives were involved"* and that as to *non-relatives* "we represent that Mr. Baradel and the other members of this *group* [including Carusi; M11869] *were the public"* (M11676-7),

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* The Court erroneously refused to charge (A522a):

"The statute of limitations is a statute of repose. Like other statutes, it declares the policy of the Federal government to the effect that it is a defendant's absolute right not to be prosecuted upon a stale claim, regardless of its merit or lack of merit. Among other reasons, such policy is established because the lapse of time may render it difficult to defend against such claims or to gather needed evidence with respect thereto. (Cf. Patterson, J. In re *Gillman Son & Co.*, 57 Fed. 2d 294, 296.) Hence, a defendant has the absolute right to interpose the bar of the statute of limitations to any and all transactions specified in any of the counts in this indictment which may be subject to that defense. The interposition of the bar of the statute by no means indicates that a defendant acknowledges that he is guilty of wrongdoing in respect of the transactions to which the bar of the statute is asserted. On the other hand, even if we assume that the evidence was sufficient to establish guilt in respect of any of those transactions, if you find that the bar of the statute of limitations applies, you must nonetheless render a verdict of acquittal as to the transactions to which you find that the bar does apply." (A510a)

the Court did not so present the issue to the jury (A328a-9a).*

If we adopt the Government's theory that these counts are to be treated as a *single unit* which petitioners allegedly manipulated as "dummies" or "conduits", then obviously the jury's verdict acquitting petitioners on the counts involving Dr. Raymond Abrams, Abrams' brother, and Emanuel Abrams, his father, is inconsistent with the verdict of guilty rendered as to any of the other members of the alleged unit, because on this theory of the Government, there was no basis for differentiation either in fact or law as to those composing the unit. Such inconsistency is vulnerable as matter of law and cannot be sustained because it offends the principle enunciated in *United States* v. *Maybury*, 274 F. 2d 899 (2 Cir. 1960), and "affords ground for reversal" (*United States* v. *Wilson,* 342 F. 2d 43, 45 [2 Cir. 1965]; *United States* v. *Sells,* 325 F. 2d 161 [2d Cir. 1963]).

If the Court's interpretation of the Government's position is correct that it was not the acquisition of Automatic stock by the nine members of this group in mid-March of 1956 but "the subsequent sales out of these nine accounts which the prosecution claims were illegal" (A328a), then wholly aside from the bar of the statute of limitations, it is difficult to perceive upon what basis the judgment of conviction can be sustained as to counts 17 through 21, ir-

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* The Court in its charge said: "As I recall the evidence, and as I understand it, there is little dispute on this fact or facts: the Automatic Washer stock was acquired by all nine of these accounts in or about mid-March, 1956. *It is not this acquisition transaction or transactions which the government claims amounted to illegal sales* of unregistered Automatic Washer stock to the public by the defendants. *Rather it is the subsequent sales out of these nine accounts which the prosecution claims were illegal.*

More particularly, if the government is to prevail in this aspect of the case it must, as it is aware, establish beyond a reasonable doubt that Abrams and Richland controlled and manipulated them for the purpose of making the later sales out of the accounts to members of the public in April, May, June and July, 1956." (A328a)

respective of whether they involve Mrs. Gwosdow or Mr. Gordon. Nor for that matter can the judgment of conviction be sustained as to counts 2 and 11 which involve sales made directly to Carusi "as a member of the public." Confronted with these shifting, inconsistent and varying theories, it is little wonder that immediately after the charge was concluded the jury promptly sent a note reflecting their uncertainty and, as previously indicated, wanted to know "which relatives and friends are associated on each count" (A427a).

(c) Count 104 was the conventional conspiracy charge, but all counts "relate to the sale of common stock of Automatic Washer Company" (*U.S.* v. *Abrams*, 29 F.R.D. 178, 180 [1961]).

The Court charged that count 1, although dismissed, as barred by the statute of limitations, could be considered by the jury under count 104, presumably because all substantive counts were realleged therein as overt acts (A300a).* Prosecution in summation stated that the sale "with respect to Mr. Baradel represented count 1 in the

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* The Court charged: "I will also remind you at the end of the government's case the court dismissed the count 1 pleaded as to Abrams and Richland for *technical, legal reasons.* Thus this count is no longer in the case and *need not be decided by you.* However, I instruct you while we are on this subject that you may consider under count 104 the evidence on the Joseph Baradel transaction, such as Mr. Baradel's testimony and that of banker Franklin Middleton and the documents they introduced which originally was admitted as being relevant to the dismissed count 1 as well." (A300a)

The Court did not charge in substance as requested (A510a, 522a) and in accordance with authority, viz.:

"Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." (*Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349).

indictment and his Honor ruled that count out of the indictment on the ground that the transactions involved did not fit within the statutory period involved in the statute of limitations" (M11675). Government counsel argued "[h]owever, you are entitled to consider, as I am sure his Honor will charge you, the Baradel transactions with respect to the conspiracy count" (M11675), notwithstanding that "[*w*]*e do not claim that Mr. Baradel or any of the other people in this group represents dummy accounts*", and moreover "[*w*]*e represent that Mr. Baradel and the other members of this group were the public. This was the public. Joseph Abrams was selling directly to the public*" (M11676).

Since the jury received no instructions as to the statute of limitations, what Government counsel said on that subject was unintelligible; the Court's charge simply said that count 1 "is no longer in the case and need not be decided" for "*technical legal reasons*", and in the same breath, instructed the jury to "consider under count 104 the evidence on the Joseph Baradel transaction" (A300a). It is difficult to perceive what these instructions could mean to laymen. Certainly, they nullified the defense of the statute of limitations upon which the Court dismissed count 1. The defense of the statute is not "technical"; it expresses a policy of repose fundamental to our society and our criminal law, especially since the lapse of time may render it difficult to defend or to gather needed evidence. *Bridges* v. *U.S.* 346 U.S. 209 [1953]; *Waters* v. *U.S.*, 328 F. 2d 739 [1964].

Petitioners moved to dismiss the conspiracy count as barred by the statute of limitations on the ground that the evidence conclusively established that as early as March 8, 1956, "there was a complete cleavage" with Albert, and that the disrupted relationship was never restored in the short interval that elapsed until Bankers Life took over on May 8, 1956, nor thereafter; the undisputable evidence

demonstrating that petitioners and Albert were in hostile disagreement since March 8, 1956 has already been documented (M1395-8, M1377-92, M1395-1402; Gov. Exhs. 3-13; M2766-9, M2782-93; Gov. Exhs. 5-Q-½; A123a-30a; p. 22 *supra*); Mr. Carmick's verification of that unassailable fact (pp. 2-4, 18, 22, *supra*), renders our contention invulnerable. The motion was denied (M11869).

The charge emphasized that every one of the substantive counts, 37 in number, are "separate acts which it is charged were done by members of this conspiracy in furtherance thereof" (A359a-60a). The jury were told: "[i]f you find that any one of these acts was done by a member who, incidentally, must be a named member, though not necessarily one of the defendants on trial", and "that such act or acts were done in furtherance of such conspiracy, then the elements of a criminal conspiracy are thereby made complete" (A359a). It is important to note in this connection that the jury at that point had been advised that they must "find that one or more members of the conspiracy committed one or more of overt acts charged in the indictment", but "[*t*]*he overt act need not of itself be criminal in nature if considered separately and apart from the conspiracy*" (A358a), and that "[*i*] *it may be as innocent of itself as the act of a man walking across the street*" (A358a).

These instructions in net effect converted each substantive count into a conspiracy count; worse yet, even if the jury found that the transaction with respect to any particular count was, as the Court phrased it, "as innocent of itself as the act of a man walking across the street", it could nonetheless be deemed an overt act in furtherance of the alleged conspiracy (A358a). Exception was duly taken because the charge "turns each of those counts into a conspiracy count which is not the fact and which as a matter of law, your Honor, could not be" (A411a).

The Court told the jury that the prosecution "has attempted to prove the existence of the conspiracy charge only during the period from November, 1955 to the end of October, 1956" (A362a-3a). Since there assuredly was an issue of fact as to the existence of the alleged conspiracy after March 8, 1956 (pp. 2-4, 18, 22, *supra*), petitioners were certainly entitled to have the jury instructed as to the defense of the statute of limitations. The Court however ruled "I don't see any statute of limitations problem on any other count than one I just mentioned", i.e. count 1 (A522a), notwithstanding that specific attention was directed to *Carroll* v. *U.S.*, 326 F. 2d 72 and also *U.S.* v. *Connor*, 237 F. 2d 466, the former treating with the bar of the statute and the latter holding that a defendant "is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be" (see also *Grunewald* v. *U.S.*, 353 U.S. 391, 406-16 [1957]).

5 (a, b, c, g). *The trial Court in effect directed a verdict by giving abridged post-charge instructions to the Jury of "four essential elements which the Government must prove" completely omitting any reference to criminal intent or other exculpatory elements required to be considered in connection with this admittedly "highly technical" offense based on a statute phrased, as characterized by the trial Judge, in "gobbledygook".*

After a full day's charge (A291a, 426a) the jury made the following request:

> "Please send in parts of Judge's summation which has to do with points which the government must prove in order to find defendants guilty on the substantive counts" (A430a).

The Court's response was an epitomized, isolated recital of "four *essential* elements which the Government must

prove''* (A430a-431a); exception was promptly taken to the Court's "capsule remarks to the jury" because they did not "take into consideration all of the other elements of wilfullness and knowledge and the other essentials of criminal intent required to be established", and that the jury thus was "considering the case purely in the light of the four essentials" specifically enumerated (A431a-2a). The supplemental charge was thus tantamount to the direction of a verdict against the accused because it told the jury that all the Government needed to establish was that defendants, "knowing that the Automatic stock was not registered", and "knowing that it was required to be registered, wilfully and knowingly directly or indirectly sold the stock to the public"** (A430a-431a). Nothing at all was said, notwithstanding counsel's caveat (M7879-80), as to any exculpatory *essential* elements such as exemptions, advice of counsel, change of circumstances, shifting of control

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* "THE COURT: These are the four essential elements which the government must prove, as you understand, beyond a reasonable doubt.

First, that in the Southern District of New York, on or about the dates cited in the count, the particular defendant wilfully and knowingly directly or indirectly made use of the mails or means of communication or transportation in interstate commerce to sell the securities described in the count in question.

Second, that at or about the time of the alleged offer or sale, the Automatic Washer stock was not registered with the SEC. That is, there was no registration statement on file with the SEC for this particular company, Automatic Washer Company.

Third, that the shares of Automatic Washer were required to be registered under the law with the SEC. That is, that they or the transactions involving them were not exempt from the registration provisions of the Securities Act of 1933.

And, fourth, that the defendant or defendants in question knowing that the Automatic Washer stock was not registered, and knowing that it was required to be registered, wilfully and knowingly directly or indirectly sold the stock to the public." (A430a-431a)

** The Court in charging the jury observed: "[t]here does not seem to be any controversy that Automatic stock was not registered with the SEC during the relevant years" (A312a); also "I do not understand the parties to dispute the documentary proof" relating particularly to the element involving "means of interstate communications" (A33a).

to Bankers Life, or for that matter, as Mr. Purcell, Regional Administrator of SEC in 1953-1955, testified he had advised petitioners, that sales to a limited group of friends and relatives "could not be a violation" of the statute.*

The error was magnified on the *following day,* when the jury again asked that there be reread that part of the charge "that we should keep in mind, the four things" (A479a). The Court thereupon reread the over-simplified section of the charge limited to "the four essential elements which go to the substantive counts under what we call Section 5 of the 1933 Act" (A 479a-81a). Counsel again voiced objection, saying, "It seems to me that the exemptions under the statute should constitute the most important element" to which reference should be made (A482a); when the Court did not give the requested instructions, petitioners' counsel thereupon took exception "to your Honor's failure to charge concerning the exemptions under this statute" (A493a).

The decision below as to this aspect of the case is in direct conflict with *United States* v. *Franz Byrd,* 352 F. 2d 570 [2 Cir. 1965].

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* Mr. Purcell testified: "This had to do, as far as my recollection goes, with the stock that was being purchased at $2.55 a share from Automatic Washer. Mr. Abrams asked me if it would be all right to allow some of his friends to participate in this purchase. I pointed out in some detail the meaning of the statutory underwriter concept as set forth in Section 2, subdivision 11, of the 1933 Act. I pointed out that in order to be a statutory underwriter you had to take from an issuer with a view to distribution, and in this connection under the holdings of the earlier cases under the SEC that distribution was synonymous with public offering. I, therefore, pointed out if he confined the participation to a small number of people—and I believe I pointed out the magic number that the SEC had used for years, 25—and that these people took for investment and understood the nature of their investment representation, that this could not be a violation of Section 5. He asked me if I would prepare an investment letter for him, which I did (M9284-5) * * * I said normally members of a family were treated as one, and I specifically pointed out a controlling person in a listed corporation filing his form 4 or form 6 would include in his reporting his wife's or his children's stock in that particular corporation even though he had no beneficial interest in those shares" (M9286-7).

There, as here the trial Court charged the jury on the definition of "*knowingly*" but did not charge on the question of "*criminal intent.*" There, as here, the Court in the earlier part of its charge and in connection with the definition of "knowingly", instructed the jury concerning "four elements" necessary to convict the deefndant (A310a, 430a). There, as here, toward the end of the charge the Court reiterated "four elements" which the Government presumably was required to prove and said:

> "Now, if you find, after such examination, that the government has proven all the four elements which I have just described to you beyond a reasonable doubt as to any of these counts, then he should be convicted on that count." (p. 574)

The Court noted:

> "Thus in the very climax of the charge the court in short explicit terms gave the jury what they would naturally regard as the nub of the law of the case and which, coming at the end of the exposition of the law, gave them what they were most likely to hold in their minds and apply to the facts in their deliberations, and which, not only completely omitted criminal intent as an essential element but, specifically told the jury that, if they found the other four elements which were mentioned, they had a duty to convict." (p. 574)

The Court held this to be error.*

That decision is indistinguishable from the instant case.

Since "many intricate interpretative problems" are raised by the Act and the "innate perplexities of the exemption" were recognized by the Government (M2265) as

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* The Court ruled:

> "By failing specifically to instruct the jury that criminal intent was an essential element of the offense, the court left what it did say about intent and the act being knowingly committed, unrelated to the other elements of the crime and omitted any instruction that criminal intent was an element which the Government, to convict, was required to prove beyond a reasonable doubt." (p. 572)

well as the trial Court, the charge was plainly inadequate for the jury to resolve the "perplexing problems of interpretation and judgment".* The interpretation of the term "underwriter" rests on the meaning of concepts nowhere defined in the Act, to wit, "control", "view to" and "distribution". The Court equated any sale "to the public" with a "distribution" and nowhere quoted the statutory words "with a view to distribution" (A304a-306a, 317a-18a, 328). But not every sale "to the public" is a "distribution" because, among other reasons, the sale must involve "a substantial block of securities". If the quantity sold is very small, in relation to the amount being traded there is no violation. (See 78 *Harvard Law Review* 1635 at p. 1638 and *Orrick, infra,* pp. 2 *et seq.*)**

Here, up to May 31, 1956, only 4500 shares were sold by all of Richland's vendees. That small number, in relation to all the shares outstanding (2,155,594) was not even adverted to in the charge (291a-387a).

We set forth† the portions of the charge relating to definition of an "underwriter". The charge (A304a-305a) that

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* Immediately after the skeletonized instructions were given as to the "four elements" and upon the reiteration thereof, proper and repeated requests were futilely made by us for a charge explaining the statutory exemptions (A482a, 484a, 412a, 418a) and our exceptions noted (A420a, 493a).

** Orrick, 21 University of Pittsburg Law Review—October 1959—pp. 1-2, 3, 23.

† "Now the word 'underwriter' as defined by the statute has its own special meaning, which is probably somewhat different from the way you have heard it used elsewhere. An underwriter for our purposes under the statute is simply anyone who buys stock from the issuer of the stock and resells it to the public, or anyone who assists an issuer, or another underwriter, in selling stock to the public (A304a). * * * In defining underwriter I used the term 'issuer.' One is an underwriter if he assists an issuer in selling unregistered stock to the public, or if he buys stock from an issuer and sells it to the public (305a). * * * (11898) In order to find that a person or a corporation is an underwriter, you must find not only that he bought the stock from an issuer, or assisted an issuer or another underwriter in selling it, but you must find that he sold the stock, or assisted an issuer or another underwriter

an underwriter "for our purposes under the statute is simply anyone who buys stock from the issuer of the stock and resells it to the public, or anyone who assists the issuer, or another underwriter, in selling stock to the public" was

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in selling it to the public (305a). * * * If a person sells stock only to a small group of people, and these people purchase the securities 'for investment,' that is, with no intention at the time of purchase to sell the stock to the public at large, then the seller and his assistants, if any, are not underwriters, and no crime has been committed even if the stock was not registered. The theory of the statute here is that a small group of people which is purchasing a permanent stake in a corporation has the power to force the kind of disclosure from the corporation about its affairs which a registration statement would give, so a registration statement isn't needed. But if, at the time they buy the stock, the purchasers have a present intention of (11899) reselling the stock to the public, and the sellers know or have reason to know this, then the sellers are underwriters since this is just an indirect way of selling the stock to the public. At this point I instruct you now that the sale of stock on a stock exchange is a sale to the public. In considering whether sales of stock are or were to the public, as opposed to a private placement or sale, you may consider any evidence which tends to show that the sales which are charged in this indictment were part of a larger sales offering which was made or planned. The existence of a large offering of which a sale in question was part, if such you find, might tend to establish that such sale was merely a facet or link in an overall scheme of sale or distribution to the public (306a). * * * (11902) If a person buys with the intention of selling his stock to the public he too is an underwriter once he makes or affects such a sale (308a). * * * When I made that remark to counsel I was referring to the self-evident fact, which I emphasize here, that there is no fraud count here in this case—that is to say, none of these defendants is charged with a Section 17 or fraud violation. However, the government contends that the defendants have committed violations of Section 5 alleged in the indictment in order to carry out a knowing illegal distribution of Automatic Washer stock, unregistered, to the public. Therefore, they indicate or argue that some (11917) of the evidence suggests that the defendants were acting knowingly and purposely to set up this general distribution or sale (317a). * * * However, the governments argues that there is some evidence admitted here before you which gives rise to the inference that the defendants, or some of them, hoped or intended to make a wide distribution or sales of Automatic Washer stock to the public at profitable prices of more than the stock was worth without a registration statement being filed which (11918), would put on record what the government contends were the true facts about the Automatic Washer Company and N. O. Nelson Company. In short, the government contends that this shows illegal intent to sell unregistered Automatic Washer stock. Defendants deny this, pointing to evidence which they say establishes that the sale prices were not out of

erroneous because it omitted the statutory requirement that the purchase from the issuer must be "with a view to * * * distribution". The statute does not say that mere purchase from the issuer followed by a sale is enough to make the purchaser an "underwriter". The reference to "distribution" made by the Court thereafter in connection with the sales *to the 9 accounts* (A305a, 317a) did not cure this fundamental omission at that point of the charge or in the epitomized enumeration of the "four essential elements."

The charge shows confusion as to Richland's status as a purchaser and as a seller (A306a, 318a). The charge converted all substantive counts to conspiracy counts even though the statute is concerned solely with "sales" or "agreements to sell". Exception was noted to that error (A411a). The Court did not properly define *the many situations* that would bring the defendants outside of the statutory definition of an "underwriter", as indicated above.

Moreover, the statute—§77d(1)—specifically exempts transactions by "an underwriter no longer acting as an underwriter in respect to the security involved in such transaction". No such instruction was given.

The jury should have been instructed that SEC itself ruled that "a distribution is complete when the securities come to rest in the hands of the investing public". (*Mtr.*

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line with the true worth of the stock, and that the sellers were relatively a small group and a sophisticated group which had access to the true facts, in any event (317a-318a). * * * As I recall the evidence, and as I understand it, there is little dispute on this fact or facts: the Automatic Washer stock was acquired by all nine of these accounts in or about mid-March, 1956. It is not this acquisition transaction or transactions which the government claims amounted to illegal sales of unregistered Automatic Washer stock to the public by the defendants. Rather it is the subsequent sales out of these nine accounts which the prosecution claims were illegal (328a). * * * The government conceding that certain profits on these sales went to the nine individuals, argues that Abrams intended it this way and that this does not negate his intention to use these accounts as a means of a legal sale to the public (329a)."

of Oklahoma-Texas Trust, 2 SEC 764, aff'd 100 F. 2d 888, cited in *Orrick, supra* at p. 3.) Since Government counsel told the jury that except for the members of Abrams' family, as to whom the jury found for the defendants, all the other persons to whom Abrams sold shares in March 1956 *"were the public"*, the Court was duty-bound to dismiss Counts 2, 11 and 12 through 21. The distribution was *complete* when the securities came to rest in the hands of that group, as admittedly they did in March 1956, the Government having said they "were the public".

Since all sales to friends and relatives were made simultaneously in March, 1956 there could have been only one "distribution" to that entire group at that time, if there was any "distribution" at all within the meaning of the Act. Therefore the conviction on counts 17 to 21 was inconsistent with the acquittal on counts 13 to 16 which related to a part of that same "distribution" group. The only possible explanation for the inconsistent jury verdict, is the epitomized "four element" supplementary charge above referred to.

The jury should also have been instructed concerning the term "the public". As Commissioner Orrick pointed out in *21 University of Pittsburgh Law Review* at p. 7 *et seq.* a proper understanding of the phrase *"public offering"* necessarily involves examination of the particular class to which unregistered securities are offered or sold. There is excluded from the "public" sophisticated investors, close friends and relatives and persons of a particular class that would be likely to have or who could readily obtain information relating to the security or who required no protection. Commissioner Orrick points out (p. 9):

> "Thus, an offering to a given number of persons chosen from the general public on the ground that they are possible purchasers may be a public offering even though an offering to a larger number of

persons who are all the members of a particular class, membership in which may be determined by the application of some pre-existing standard, would be a non-public offering."

Under this definition the sales made by Richland in March 1956 were not sales to "the public". There was therefore no "public distribution". The Government claimed that an intention to distribute—even though that intent is in good faith later changed—is a crime if followed by any sale. This, of course, completely overlooks the possibility of, and the right to, a change of mind if made in good faith after the acquisition of the shares and before any sale (See, on this precise point, *Loss on Securities Regulation,* 1st Ed. [1951] footnotes at pp. 346, 147).

Because Judge TYLER observed it would be "murder" to explain this perplexing statute loaded with *"gobbledygook"** (M10088), presented no reason for leaving the jury without adequate explanation. Proper and repeated requests were futilely made for a charge explaining the statutory exemptions (A482a, 484a, 412a, 418a, 550a to 554a) and exceptions noted (A420a, 493a). Moreover why should a man be sent to jail today upon a *current* interpretation of an admittedly complex, intricate and hardly understandable statute, *not generally accepted in 1956?* Our request to charge (No. 62) to the effect that

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* Understandably, Judge TYLER made this graphic comment: "If I were ever to get into the gobbledygook definition of the statute that appears in the 1933 Act, it would be murder" (M10088), and "one of the great problems I find in this case is one you all know about: that this is a difficult statute to make comprehensible, I believe, to lawyers as well as to laymen, and I don't want to be going down the glory road with a lot of zigging and zagging by the way of fancy definitions and so on and so on which may tend to obfuscate and not help" (M10554).
In a column in the New York World-Telegram of February 12, 1965 giving advice to the investing public, entitled "SEC hazy in defining stock terms", it is said: "SEC has never come up with a hard and fast definition" as to "restricted stock" and "controlled stock", and moreover, "when you try to pin the SEC down on the specifics, all you get is a blank stare—or a sly grin".

the difficulties encountered by Bench and Bar as to the interpretation of these statutory provisions may be considered by the jury on the issue of criminal intent, should have been granted (A552a).

The number of criminal cases grounded solely upon a technical violation of the statute has been miniscule and with good reason. In the light of these acknowledged problems in construction in what the prosecutor himself characterized as a *"highly technical"* offense (M2265), for the Court to have instructed the jury that there is a presumption that every person "knows what the law forbids, and knows what the law requires to be done" (A299a), was plain error because, courts throughout the land have been decrying the intricacies and difficulties in interpreting the statute and particularly the definition of "underwriter" and "distribution" and yet the trial Court told the jury that every individual was "presumed to know the law". Surely the jury was entitled to know of the difficulties that the average citizen and the average lawyer, indeed even the experts in SEC law and judges themselves were necessarily encountering in 1955 and 1956 in interpreting the statute which was "far from a model of clarity" as the Court put it (*U.S.* v. *Crosby,* 294 F. 2d 928, 942) and which Judge TYLER himself acknowledged was a "difficult statute to make comprehensible" (M10554), since it was couched as he phrased it in "gobbledygook" (M10088).

A huge block of Automatic Washer unregistered stock was being traded on the Midwest Stock Exchange *lawfully* since all the shares that had been issued prior to the effective date of the Act were exempt.* The brokerage houses involved in this case, including Hentz & Company, Berk &

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* See Gov't Exh. 1-8a, 8b M7377-8, "List of Stock Prices and Volume of Automatic Washer Company; Trade Dates". This exhibit shows total sales in December 1955 of 103,900 shares; January 1956—115,100 shares; February, 1956—43,500 shares; March, 1956—51,400 shares; April, 1956—46,100 shares; May, 1956—71,100 shares.

Co., and Henry Montor, as well as others, owned such "fungible" shares (M10981) and traded in them constantly at all times involved in this case (M7658 and Exh. 1-8a, M7377-8). Consequently, who could say that the shares of stock sold by any of the nine accounts were not shares traded and previously exempt from registration? And the undeniable fact is that the specific shares although unregistered and sold to the nine accounts had already been cancelled in March of 1956, as testified to by SEC witness Siefried (M8278, M437-8).

The present interpretation of Rule 133 by SEC is the result of a long and tortuous backing and filling since 1935 when the "no sale" theory was first evolved in the case of a merger, consolidation or reorganization. It was on this theory that Purcell* testified that 5,000 shares of stock he received was "free stock" which shares were turned over to Richland and Abrams (M9290-4). It was his opinion in 1955 and early 1956 that sales of such stock were entirely lawful without a registration statement, and indeed, this belief was reiterated in *Loss* on *Securities Regulation,* 2d ed. Vol. 1, p. 531 where Prof. Loss quotes a ruling by the SEC, 37 SEC 683 at p. 690 (Kroy Oils, Ltd.):

> "Indeed, the Commission took pains to point out that 'subsequent casual sales of such stock by non-controlling stockholders which follow the normal pattern of trading in the stock' *would be exempt under that clause*" (p. 531).

The clause referred to, is the first in §4, subd. 1 of the Securities Act of 1933.

The uncertainty of the law appertaining to a "change of circumstances" was also pointed up in the Practicing Law Institute discussion in 1962 (SEC Problems of Controlling Stockholders, Practicing Law Institute 1962 Edition pp. 37-38), where the *opinion was expressed that a complete*

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* Purcell was judicially recognized as "an experienced securities attorney" in *U.S.* v. *Crosby,* 294 F. 2d 928 at p. 938.

change in the management of the issuer corporation "might be a change of circumstances" justifying the sale of non-registered stock that had been taken for investment. That such a change occurred here on May 8, 1956 is undisputed.

*Although Judge Tyler acknowledged that: "The only person * * * who was in control of this company [prior to May 8, 1956, when Bankers took over], was one Sidney L. Albert * * * "* (A413a), *he refused so to charge* (A413a, A420a, A549a-50a, A566a).

The Government claimed below that Rule 154 now protects only the broker and not the principal. While this may be a *clarified present interpretation* it certainly was not the understanding of the bar in 1961 or for that matter in 1955.*

As a corollary, the Court should also have charged the jury *separately* as to each block of 50,000 shares acquired by Abrams and Richland. A person may take "part of a block for distribution and part for investment" (Loss, *supra*). Here this distinction is crucial for concededly *Abrams* did not make a sale of a single share of the first block of 50,000 shares purchased in December 1955 for $127,000. until August 1956; Richland began to sell these shares only after control of Automatic passed to Bankers Life (A49a, 50a), and after the Witkin defalcation which involved a huge loss to Abrams as the result of this employee's embezzlement (M9325-7, 9227-8, 9250, 9414-25), and after Albert's securities had been foreclosed by various banks and literally dumped by the banks (M6622-6, 6628, 6646-7) upon the open market *and after having obtained legal advice* (M9286-7, 9144). *Significantly,*

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* Loss in *Security Regulation* (2d Ed.) said:
"Although the rule is expressly directed at §4(2), it was obviously contemplated that *the seller's part* of the transaction would be considered to be *exempt* under the first clause of §4(1) whenever the broker's part came within the rule" (p. 705 note 178).

Abrams did not make a single dollar of profit on these sales **but *on the contrary lost $30,351* (M10460).**

None of these distinctions and exemptions was sufficiently explained in the charge in spite of defendants' requests that the jury be adequately instructed as to the statutory exemptions. The mere fact that the interpretation of the statute has traditionally been regarded as difficult, required the Court to instruct the jury meticulously. Even Commissioner Manuel F. Cohen of SEC admitted before the Practicing Law Institute *as late as 1962* that this was an area productive of misunderstanding.*

The gravity of the error in the erroneous instructions heretofore discussed, is brought into sharp focus by a consideration of substantive counts 22-25, 55-57, 75 and 79.

Even when the jury returned after a full day's deliberation and asked for a rereading of the "four *essential* elements" the trial Court refused to mention the exemptions essential to the defense.** Of the two 50,000 share blocks, one originated in the finders fee arrangement and ulti-

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* Commissioner Cohen asserted:

> "This promoter's stock perhaps needs some explanation because there is an area where there is some misunderstanding. There are references, and we see them in incoming letters of inquiry, to a so-called promoter's exemption. Of course, there is nothing like that in the statute. A promoter's exemption is really an application of a non-public offering exemption found in Section 4(1) to a particular type of transaction in which a promoter acquires the stock. Those cases are not quite as clear as we would like to have them. It depends upon the circumstances of the case, whether or not that exemption may be available" (p. 62 of the transcript of the PLI Forum on SEC problems).

** "THE FOREMAN: * * * [i]f you can read us part of your charge again. THE COURT: Would you like that? THE FOREMAN: Pertaining to the different things we should keep in mind, the four things. THE COURT: The four elements? THE FOREMAN: The four essential elements, yes. THE COURT: All right. I will read those four elements again" (A479a).

"MR. TEPPER: Would your Honor ask them whether they want to hear about the exemptions? THE COURT: Let us hear what happens. I will go out and read this. MR. TEPPER: The only way your Honor can find out is by asking them" (A484a).

mately figured in the rubber machinery deal, and the other resulted from the purchase at $2.25 a share in connection with the Automatic-Pierce Governor contract of December 8, 1955 (A324a, A425a-6a). The 8500 shares which were involved in the "nine accounts" here discussed were derived from the 50,000 share block, i.e., the finders-fee, rubber machinery shares (A325a). The shares involved in counts now considered, the Government asserted, were derived from the block of 50,000 shares purchased in connection with the Pierce Governor contract (M11929-30). *Count 22* alleged a sale of 300 shares of Automatic on August 27, 1956; *Count 23* a sale of 200 shares on August 27, 1956; *Count 24* a sale of 100 shares on September 4, 1956; *Count 25* a sale of 100 shares on September 5, 1956 (A46a). The Government was unable to key any specific stock certificates to these counts (M8258-72); Government witness Seifried ultimately admitted that proof of the sale of the 800 shares involved could not be specifically related to these counts (M8278).* Since it was the Government's contention, sustained by the Court, that each count constituted a separate crime (M7645-50), specific proof of a sale relating to each separate crime, that is, each separate count, therefore was essential to sustain a finding of guilt. Absent such proof, there should have been a direction of acquittal.

Count 56 involved a sale of 1100 shares on August 31, 1956; *Count 57* a sale of 2200 shares on September 5, 1956;

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* Seifried testified: "Q. Now, is the same thing true as to all the certificates from which C14105 through C14112 were derived? A. This whole 800 shares, that is right, came from an issue of February 21, 1956. Q. So that, on the other hand, the certificates TCU322 through 371 were derived, were issued in December, 1955, or January, 1956? These certificates, TCU322 through 371, 1000 shares each, in a total amount of 50,000 shares, were— Q. Issued January 12, 1956? Am I right? A. That is correct. Q. Right? A. That is correct. Q. *So that those shares were not the shares that were referred to in counts 22, 23, 24 and 25 of the indictment, about which I inquired before? A. I don't know.*" (M8278)

count 75 a sale of 100 shares on *October 2,* 1956; and *count 79* a sale of 4200 shares on October 23, 1956 (A50a).

This 50,000 share block was received by Montor on July 18, 1956 (M2801). Montor's former manager, a Government witness described that brokerage firm "as a good, sound reputable brokerage house" (M2723). But 40,000 shares were sold; the situation graphically portrayed by the undisputed evidence as reflected in petitioners' chart (Exh. DAR-DV, M10460) is for convenience here set forth in reduced size:

"RICHLAND'S PURCHASE AND RESALE OF AUTOMATIC WASHER STOCK UNDER PIERCE GOVERNOR CONTRACT ON DECEMBER 8, 1955

Date Acquired:	Dates Sold:
January 12, 1956	August 24, 1956 to October 1, 1956
(50,000 shares purchased at $2.55 per share.) Certificate numbers (TCU 322-371.) COST PRICE $127,500	40,000 shares sold through HENRY MONTOR ASSOCIATES. Certificate numbers TCU 322-371 Total sales price $71,649 Cost of 40,000 shares at $2.55 per share $102,000 Sales Price 71,649 *LOSS* 30,351

MIDWEST STOCK EXCHANGE

Month	Volume	High	Low
AUG.	78,200	2¼	1⅜
SEPT.	79,200	2⅜	1⅝
OCT.	177,400	2	⅝" (Exh. DAR-DV, M10460)

The shares involved in these counts thus were placed with Montor several months after May 8, 1956 when Bankers Life came into control of Automatic and Albert, as already demonstrated, was no longer a control person. Of important significance is the further undisputed fact that not a single share was sold by petitioners until late August, 1956, as above indicated.

Further undisputed facts demonstrate that these sales made through Montor, at a substantial loss, in the period

beginning August 24, 1956 through October 1956 could not possibly have involved any criminality. Not only were these shares sold after Albert was no longer a control person of Automatic, the decisive legal significance of which will be discussed shortly, they were sold under these compelling circumstances. There was, as already indicated, a complete cleavage between Abrams and Albert (pp. 2-4, 18, 22, *supra*). Abrams sustained a huge financial loss as the result of an embezzlement by Theodore Witkin, described as his "right hand man" (M2997). He ran Richland's office, and was a CPA as well as a member of the Bar (M8540, 8561, 2612). The Witkin defalcations were discovered early in August 1956 after Abrams returned from the Virgin Islands trip (M9325-7, 9227-8, 9250, Applts' Exh. DAR-CL; p. 35, *supra*).

Moses Polakoff, a reputable member of the Bar, a former Assistant United States Attorney, practicing law for more than 40 years (M9413-4), testified that Abrams consulted him as to the Witkin defalcations; detectives were employed, essential photographs taken, and a confession ultimately obtained (M9414-25; DAR-CQ; A623); the contemporary photographs, bill and check then issued in connection with these matters as well as the confession itself were introduced into evidence (M9414-8, Applts' Exh. DAR-CO/CP/CQ/CR/CS; M8560-1, Applts' Exh. DAR-BO, A618a, 620a*).

Harold L. Garner, Mr. Witkin's attorney (M8539-40), under subpoena by the Government but (M8514, 8556),

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* The confession dated October 24, 1956 in Witkin's own handwriting (M8561) acknowledges: "I also withdrew unauthorized by you a net amount of approximately $227,000.00 from your various accounts and company accounts to whom you had loaned money as against such loans. This money was taken out from time to time from November 1955 through August 1956. I used these funds for gambling and lost all of the money as I withdrew it and have none left to repay" (Applts' Exh. DAR-BO; A618a).

called as a defense witness (M8538), testified that he and Witkin had been in very close relationship from 1926 through 1956—indeed, up until the time of Witkin's death in the summer of 1957 (M8540-1, 8554). In August 1956, he was consulted by Witkin as to these defalcations (M8541-54). Eventually a conference was arranged at Mr. Garner's office. Mr. Polakoff, Abrams and the detectives employed attended (M8542-3, 8546). Mr. Garner said he did not let the detectives "come into my private office" (M8543). The record leaves no room for a doubt about the fact of these defalcations (M8548).* The amount purloined ran into several hundred thousand dollars (M8551-2) which Witkin admitted at that very conference in the presence of Polakoff, Abrams and himself (M8552). Witkin was not prosecuted; he was gravely ill, "a very very bad diabetic". He had had a "stroke" and "he could have collapsed any minute" (M8585, 8554). His death not many months later (M8554) and the fact that confessedly he lost all in gambling, and had no money "left to repay" (Exh. DAR-BO; A618a) demonstrated the utter futility of prosecution, which evidently he would not have survived. The prosecution, on Garner's cross, adduced the fact that as early as 1960 he told SEC counsel "the entire story", among whom were Mr. King, Mr. Stein and Miss Holdridge, *all of whom were then present "sitting at the counsel table"* (M8576). *There was neither denial nor refutation by them of this testimony.*

Joseph H. Lesh, an unimpeachable witness** for petitioners, gave important testimony on this aspect of the

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* Mr. Garner testified: "Mr. Polakoff demanded that Witkin give back certain stocks, certain papers, certain records that he had taken from Mr. Abrams' safe or office. I told Witkin to give it back to Mr. Abrams. Mr. Witkin gave the papers back. There were quite a number of envelopes, stock, which I did not look at. He gave it to Mr. Abrams and Mr. Abrams took it." (M8548)

** It is fair to add, since the integrity of petitioners' witnesses is so important in this case, that Mr. Lesh was a "gunnery officer" in the Navy during the second World War and after the war continued to serve this Government in a legal capacity as "assistant discipline officer" (M9225).

case; he was appointed by President Eisenhower "as United States Attorney for the Northern District of Indiana" in 1953 (M9225). Thereafter he was "assistant to the Deputy Attorney General of the United States in charge of the executive office for all United States attorneys" (M9222), having been designated to that position in September 1954 by Attorney General Brownell (M9223), and in 1956 Mr. Lesh had been "commissioned as special assistant to the Attorney General of the United States" (M9222); he knew Abrams since 1955 (M9226). He testified:

> "He [Abrams] stated that after he got back from the Virgin Islands a man by the name of Watkin or Witkind, something like that, who was one of his trusted employees, had stolen a lot of money from him, embezzled a lot of money from him. I think he said something like three or four hundred thousand dollars." (M9229-30)

Mr. Lesh testified: "So I told him that I thought that that would justify his selling the stock" (M9230). Abrams asked him for a written opinion which he said he could not give because "I was prohibited by the Attorney General from the private practice of the law and I could not under any circumstances give him any written opinion" but "I could advise him as a friend, but not as an attorney" (M9230-1); he told Abrams "that he should get a written opinion from some other lawyer" (M9223-4).* Indeed, Mr. Lesh said, "I called up somebody in the SEC and asked him what they thought about a no action letter and they said it would probably be two or three months before they could get a no action letter out" (M9232).

In conformity with Mr. Lesh's suggestion, Abrams did obtain a written opinion from Leo Gitlin, an attorney admitted to the Bar for more than 30 years, who had served

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* After leaving the Government and in 1959, Mr. Lesh said he represented Abrams only in one matter for which he received a fee of $1,500 (M9248).

"with the War Office of the Department of Justice from the beginning of 1942 to late 1944" (M9324). Abrams consulted Mr. Gitlin in August 1956 "in connection with the proposed sale of 50,000 shares of the common stock of Automatic Washer Company by Richland Securities" (M9325). He was advised of the Witkin defalcation (M9327). Mr. Gitlin testfied he was advised of Abrams' conversation with Mr. Lesh and as to the effort "to get a no action letter from the Securities and Exchange Commission and the Securities and Exchange Commission at that time could not give him one as promptly as Mr. Abrams wanted, and he was told to get a letter from an attorney attesting to the exemption of these securities from registration" (M9340). Gitlin's written opinion dated August 24, 1956 *was offered by the Government* (M9341), and received in evidence without objection after the Court directed excision of an irrelevant paragraph (M9343-5, Gov. Exh. 5-U-1, A629a-30a). The portion quoted below tersely and accurately reflects the existing situation.*

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* The opinion letter of Mr. Gitlin states:

"It is my further understanding through conversations with Mr. Purcell that at no time did you personally have any interest in the management of Automatic Washer Company, and do not have any interest in said management at the present time, nor were you ever an officer or director of said company, nor at any time had control or exercised any controlling power in Pierce Governor Corporation.

I have read with interest the letter issued to you by McGrath & Brown, Esqs. of Washington, D.C. dated June 4, 1956 and know of your serious financial and legal involvement arising in part from the defalcation of your office manager and attorney, Mr. Theodore Witkin.

Based upon the above, it is my opinion that, due to your change in financial circumstances and the facts relating to your interest in Automatic Washer Company which I have mentioned above, Richland Securities, Inc. is free to dispose of the 50,000 shares of the common stock of Automatic Washer Company, and I know of no rule or regulation prohibiting you from the sale or liquidation of these shares.

May I recommend that, in view of the sensitive market in this stock, that these shares be disposed of over a period of time so that the sales would not adversely affect the true market in this stock." (Gov. Exh. 5-U-1, A629a-30a)

Gitlin transmitted a copy of his opinion letter to Montor. His communication advised "that these shares be disposed of over a period of time so that the sales would not adversely affect the true market in that stock" (Gov. Exh. 5-U-1, A629a-30a), and that is precisely what Montor did.

At the end of May through June of 1956, *after Bankers Life "with millions of dollars of assets" had acquired control of Automatic* (M6871-2), there occurred what the Midwest Stock Exchange aptly described as *"the Bellanca-Sydney Albert debacle"* (pp. 106-9, *infra*). Albert, concededly up to the time these transactions were begun, was a very affluent businessman of substantial and diverse interests (M103, 1537D-E, 3486). Among his other holdings, Albert had a controlling interest in Pierce Governor, still a very sound company listed on the American Stock Exchange (p. 14, *supra*). Under the Automatic-Pierce Governor contract of December 8, 1955, Pierce undertook and actually did purchase 330,000 shares of Automatic stock at $2.55 per share, *all paid for by February, 1956* (M1227-8, 1294, 1554, A622a-3a, Exh. DAR-CU; p. 14, *supra*), which brought into the coffers of Automatic much needed cash in the substantial sum of $841,500.

That transaction involved Abrams' participation in the acquisition of the second block of 50,000 shares at $2.55 per share, in order to expedite the necessary financing (M1799-1801). Albert, among other assets, also owned 1,071,250 shares of Bellanca, representing 82% of that company (M233, 476, 7229). Bellanca had substantial stock interests and controlled various companies (M6801).

On August 25, 1955, Albert had negotiated a bank loan of $850,000 in nowise connected with the transaction involved here (M6472). James M. Dawson, a *Government witness* (M6457), testified that with respect to a sizeable loan of that character the bank in ordinary course "would

have made a thorough check of Mr. Albert'' and did so (M6479); that as loan officer he inquired about and was satisfied with the purpose of the loan (M6480); that the collateral was ample and that the transaction *did not envisage liquidation of the loan through the sale thereof* (M6481-2). The loan, which matured on February 28, 1956, was renewed. It was then considered a good loan, well collateralized. Mr. Albert's credit rating was good; otherwise they would not have renewed the loan (M6484). The bank had 100,000 shares of Bellanca stock as collateral which then had a market value of $2,250,000 (M6485-6).

Mr. Dawson said there was a ''break'' in the market ''around the end of May, early June'' (M6487). It was a severe sinking spell (M6491). On June 6, 1956, the bank demanded additional collateral. On June 12, 1956, a further demand for collateral was sent (M6487). There was a considerable drop in the market value of Bellanca from a high of about $22 in February 1956 which by June 12 reached a low of about $6 (M6485-7). Albert had been persuading the bank *not to sell* (M6488-91, 6495-6) *and indeed pledged and actually forwarded additional collateral to the bank* (M6491-3).* There was no doubt about the *bona fides* of this loan (M6520-1). The vice president of the same bank, a Government witness, assumed Mr. Dawson's duties while the latter was on vacation (M6564). In a conversation with Albert on July 25, 1956, Albert said ''he would send us $100,000 as and when he received a check from—when he sold the stock of Selby Shoe that he would pay $50,000 to us from the proceeds once he sold the Ballanca hangar on which we held the mortgage and that he would make a payment of approximately $100,000 from the sale of real estate by a Canadian plant that he

* As additional collateral Albert posted a mortgage on Chicago realty; a mortgage on realty in Connellsville, Pa., and a chattel mortgage on personal property of his in that city (Exh. DA-V; A337a).

hoped to sell'' (M6568-9). *Albert did make three cash payments of $50,000 each on August 21, August 27 and November 23, 1956* (M6514-8). The bank realized $210,000 on the mortgage (M6507-8). Albert also said ''he was going to send me 5000 shares of Standard Industries'' which he did (M6570).

Part of the additional collateral consisted of 33,351 shares of Automatic (M6613-25). There can be little doubt but that Albert was denuding himself of whatever assets and funds he could obtain and supply in order to stave off a disastrous sell-out; the bank however kept pressing him for cash (M6613, 6640) and when that was not forthcoming, began selling off the collateral (M6622-3). In the short period from July 25, 1956 to August 31, 1956, the bank sold out the entire block of 33,351 shares of Automatic (M6623). It was the bank solely that decided upon that drastic and disastrous sell-out (M6623-6, 6646-7); the first sale was at $3 per share and the last was at $1⅞ (M6628). White candidly acknowledged that Albert was ''quite disturbed'' because he wanted none of the collateral sold (M6629-31).

A disastrous parallel was testified to by Albert J. Hamilton, vice president of the Harvard Trust Company (M9968). On January 25, 1956, Albert had negotiated a loan there, originally in the sum of $120,000 (M9969) and made an additional loan of $75,000 on March 25, 1956 (M9970). The $120,000 loan was secured by 10,000 shares of Bellanca (M9973-4). In connection with the $75,000 loan, Albert deposited as collateral 4000 shares of Bellanca and 10,000 shares of Automatic (M9973, 9981). With the break in the market that occurred the bank demanded additional collateral (M9974). Hamilton acknowledged that *cash payments* were made in reduction of this loan; on the $120,000. loan there was a cash payment on August 27, 1956 of $10,000., another on October 8, 1956 of $20,000. and a third on November 9, 1956 of $5,000., reducing the balance to

$85,000. (M9975). *More important, Albert supplied additional collateral which consisted of "an assignment of the proceeds of a life insurance policy on his life"* (Exh. DA-AT/AU; M9976-9; A338a) *and also a mortgage on real estate* (M9976, 9978); decisive indication of Albert's desperate endeavors to prevent a sell-out. The bank nonetheless *unilaterally* determined to sell the collateral in order to protect its position undoubtedly influenced by the continually declining general market (M9978-80). With these huge blocks of stock thrown on a deteriorating market in this relatively short period by these bank creditors, it is understandable why insufficient funds were realized to liquidate the full indebtedness (M9982). In answer to the prosecution, Mr. Hamilton said that the bank did not bring suit for the unliquidated balance of the indebtedness (M9982) for the reason, equally understandable under these circumstances, as Mr. Hamilton testified: "It was our opinion that there were no assets available to sue on" (M9983).

Again illustrative of what has been so aptly described as the "*Bellanca-Sydney Albert debacle*" is the testimony of Albert's financial transactions with Francis I. duPont & Co.

Albert *in March of 1955* had negotiated a loan of $1,200,000 with that Company, collateralized with 300,000 shares of Bellanca (M7204-6). This was a banking transaction only (M7227). Francis I. duPont & Co. was the second largest brokerage house in the country (M7224). Daniel K. Chapman, a member of the firm, a Government witness, testified that under the regulations of the Federal Reserve Board, the loan could not exceed more than 35% of the value of the securities and in this instance the loan represented roughly "twenty-eight per cent or a little less" (M7206). The market value of the stock pledged in round numbers was between $4½ and $5 million dollars (M7245). DuPont's "sole transactions for Mr. Albert, L. Albert & Son, was to build

up a debit for him of $2,000,000 dollars which was used to acquire large blocks of stock in different companies" (M7258). This was not a trading account. On October 10, 1955, there was a credit in the account in the substantial sum of $400,000 (M7259).

DuPont "had at that time extensive facilities for investigating customers and issues" (M7224). It was the firm's policy to investigate the business background of a borrower such as Albert, on a loan close to $2 million dollars (M7283-4). On June 7, 1956 Albert's debit balance was $1,900,000 (M7262-3). On that same day, a demand was sent to Albert to furnish additional collateral. On the very next morning, DuPont started to sell the collateral. Between June 8 and June 12, 1956* (M7266) they sold the 300,000 shares of Bellanca and practically everything else in Albert's account. *The market value of the shares understandably dropped 50%* (M7267). On June 5, 1956, DuPont also held 20,000 shares of Automatic which had been taken in on February 23, 1956 against an advance of $50,000 to Albert, which represented but 28% of the market value at that time (M7207-8, 7246), which ranged between a low of 8– and a high of 8¾ (Gov. Exh. 1-8a, M7369-70).

DuPont immediately began dumping Automatic shares right at the opening of the market on June 8, 1956 (M7274). The shares were sold, solely in the interests of DuPont to liquidate the debit balance. They did not wait for, nor received, any instructions to sell from Mr. Albert (M7254-5). *The entire block of stock was sold out in that one month* (M7268-9, 7294-5)!

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* The record shows: "The question is: Isn't it true that from June 8, 1956, the morning, until June 12th— talking now about trading dates, not settlement dates—you sold out approximately 300,000 shares of Bellanca and practically everything else in that account in order to compensate yourself for your debit balance? A. I would believe so." (M7266)

5(d). *A verdict of guilty was inevitable perforce of the Court's charge that if defendants acquired Automatic with intent "to sell to the public the fact that such defendants later suffered a severe change in their personal circumstances before they actually sold it to the public is not relevant and will not keep them from being guilty as statutory underwriters"* (A308a-9a). *The error was aggravated by the refusal to charge that if "a change of circumstances occurs recognized by law as justifying resale" and "on the basis of such circumstances that person then sells the unregistered stock, such resale is not unlawful"* (A104a). *Intent to commit an unlawful act, in fact legal at the time of its commission is no crime nor punishable as such.**

It is Hornbook law that "there must be a sufficient criminal act or omission as well as a criminal intent; mere criminal intent is not punishable" (22 Corpus Juris Secundum, Criminal Law, §37a, p. 125). Directly in point are *U.S.* v. *Chambers,* 291 U.S. 217 [1933]; *People* v. *Jaffe,* 185 N.Y. 497 [1906]; *United States* v. *O'Carter,* 91 F. Supp. 544 [1949]; *U.S.* v. *Petrillo,* 75 F. Supp. 176 (pp. 180-1) [1948]. It is fundamental that *mere intent* to violate a law, not followed by actual violation, is not a crime (*Sherman* v.

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* The Court charged: "However, if you find that any of the defendants took the Automatic Washer stock with the intention at the time of taking to sell it to the public, the fact that such defendants later *suffered a severe change in their personal circumstances before they actually sold it to the public* is not relevant and will not keep them from being guilty as statutory underwriters" (A308a-9a).

The record further shows: "Mr. Tepper: We respectfully except to so much of your Honor's charge as indicates that even if stock is taken with the intent to distribute if thereafter there is a change of circumstances occurring which would justify the sale, that such a sale would not be a lawful sale.

Mr. Gottlieb: The criminal intent, your Honor, followed by, let us say, a change in statute, which is one reason which might make lawful a change and eventually might make the sale lawful, that an act which occurs at the time the act was lawful cannot serve to make a criminal intent, a commission of a crime. Now that is the point we make, your Honor" (M12074-5) (A104a-5a).

United States, 10 F. 2d 17, 18 [6 Cir. 1926]. Illustrative of the same proposition are *United States* v. *Schenck,* 126 F. 2d 702, 704 [2 Cir. 1942]; *Heidelberg* v. *United States,* 324 F. 2d 678, 679 [5 Cir. 1963]; *Elwert* v. *United States,* 231 F. 2d 928, 932 [9 Cir. 1956]; *Holt* v. *United States,* 272 F. 2d 272, 278-9 [9 Cir. 1959]). The effect of the charge here made, and the refusal to charge as requested, permitted the jury to ignore completely *any interim change in intent**, as well as the severe change of circumstances, if they concluded that at the time of acquisition there may have been an *intent* "to sell to the public" notwithstanding that at the time of actual sale it was perfectly lawful to do so. These rulings eliminated from the jury's consideration that after May 8, 1956 there was a complete change of control and the Witkin defalcation which served to exempt petitioners' sales from the interdiction of the Securities Act and rendered such sales lawful.

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* Judge TYLER had charged the jury: "If you find that the defendant in question *originally intended to pay off the loan* but later, deciding he would prefer to have the stock sold out to the public, and purposefully and knowingly went ahead to let the pledgee bank * * * sell out the unregistered stock with the view of using this as an indirect method of sale of unregistered stock to the public, you may determine that this is a transaction in violation of the law" (A322a); petitioners were accordingly entitled to have the jury given converse instructions, namely, there may have been a change in initial intent to sell to the public and accordingly if the jury found that subsequently to time of acquisition there was intent to make, and the circumstances permitted, a valid sale, the jury could determine concomitantly that it was not in violation of law.

The record further shows: "Mr. Tepper: I respectfully except to so much of your Honor's charge as fails to advise the jury in greater detail concerning the fact that Abrams could not have been a statutory underwriter after May 8, 1956, when Bankers took control. *I think that there is an inadequate explanation of the statute and the attending facts and circumstances which are so important as of that date.* I respectfully except to your Honor's not pointing out to the jury the fact that control of Automatic Washer stock was first acquired on April 6th by Mr. Albert or his company and then lost on May 8th, which was only a period of one month. I don't think the jury has had an adequate presentation of that state of facts which is undenied on the record" (A420a).

Nor was the grave error limited to the foregoing. The Court charged that "[a]n underwriter for our purposes under the statute is simply anyone who buys stock from the issuer of the stock and resells it to the public or anyone who assists an issuer, or another underwriter in selling stock to the public" (A108a, 304a); to which exception was taken (A408a-9a). Such oversimplification without clarification and without the requested reference to the applicable exemptions (A482a, 484a) confronted the jury with no alternative but to conclude that petitioners necessarily were in the category of underwriters and that any sale to the "public" was unlawful; especially so after the reiteration of the very limited segment of the charge treating with the so-called "four essential elements" (A480a-4a). As a final but persuasive footnote to this discussion, we cite the exception taken to the charge that:

> "In determining whether a defendant has acted wilfully, it is not necessary, as I said earlier, for the government to establish that he knew that he was breaking a specific law or any particular rule" (A314a).

The jury was further told to take into consideration "*the defendant's own awareness of the law* in determining whether or not that defendant honestly believed and relied upon the advice given to him by counsel" (A320a). Previously the Court had charged that "until outweighed by evidence to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done" (A299a). Generally of course that is true, but wholly inapplicable to the statute here involved which has been criticized as follows: "[*t*]*he statutory and administrative regulatory scheme over this area is far from a model of clarity; such a situation is aggravated when, as here, criminal liability is based on the failure to comply with the law*" (*United States* v. *Crosby*, 294 F. 2d 928, 942 [2 Cir. 1961]), and in like vein by leading authorities,

scholars and financial experts. Counsel were therefore justified in taking exception to the instructions that defendants were presumed to have knowledge of these statutory requirements baffling to legal experts (A402a).*

5(e). *It was error to sustain the exclusion of the official report of the Midwest Stock Exchange in relation to continuance of trading in Automatic on that exchange, on the ground that petitioners "had the burden of showing that the document qualified under 28 U.S.C. §1732, the statutory business record exception"* (App. pp. O-11, O-12), *the trial Court having ruled "Of course that is kept in the regular course of business"* (M9268-9) *and Government counsel having stipulated "Your Honor, we will agree to the authenticity of the Midwest Stock Exchange documents"* (M8830).

In the crucial month of July, 1956 (*after Bankers Life came into control of Automatic,* pp. 16-21 *supra*), a supplemental application was presented to the Midwest Stock Exchange by Automatic to list 492,500 additional shares of its common stock in connection with the acquisition of some oil properties in Louisiana (A134a). In an official report dated July 31, 1956, part of the regular files and maintained in the usual course of business, the authenticity of which was acknowledged by Government counsel (M8830, 9007-8, 9268-70), it was stated:

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* "The Court: Essentially, yes, you are right, *I did say that: everyone is presumed to have knowledge of the law.*

Mr. Cahn: As this ties in to wilfulness, I except to that.

Mr. Gottlieb: So we do not have to repeat this aspect, I would like to state our position on it. (12056) What we take exception to, your Honor, since this was a particular statute requiring particular acts and requiring special knowledge, to charge that a layman is presumed to know that statute which the Court of Appeals has said was not artfully drawn, I think is calculated to give this jury a misimpression. I think the general statement that you presume to know the law does not say that they * * * that this particular Act, which requires lawyer's advice, is something that they are presumed to have knowledge of" (A402a).

> "Automatic Washer has been involved through stock ownership in the *Bellanca-Sidney Albert debacle.* The Exchange has been concerned with this situation. Automatic Washer is the only one of the various Albert issues listed on Midwest Stock Exchange. *When the banks and brokers sold out Albert's holdings in Bellanca and other companies a few weeks ago,* the price of Automatic Washer declined on the Midwest Stock Exchange. The 1956 price range has been from a high of 9¾ to a low of 2½. The last sale yesterday was at 2⅞. There has been an abnormally large number of shares bought and sold this year, volume being in excess of 500,000 shares." (A134a)

The report noted that "We carefully considered the question of suspending trading in the issue and concluded that *such action was uncalled for at this time"* (A134a-5a). The report referred to conferences had between officers of the Exchange and Automatic's independent auditor with regard to his audit of December 31, 1955 (A135a, Exh. DAR-CU, A622a-3a) and to an important conference had between the chief officials of the Exchange and Automatic (A135a-6a). The report noted

> "It was pointed out to Mr. Chamberlin that the April 30, 1956 Statement of Automatic Washer showed working capital of only $96,802.00 and cash of $191,821.00, with a *four months' loss in 1956 of $446,611.00. In reply to a point blank question as to whether his company was solvent, he said it was.** He further stated that since the Company was just going into production of washing machines, it did

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* The correctness of Mr. Chamberlin's observation is borne out by the following from the opinion rendered in the reorganization proceedings (In re Automatic Washer Company, 226 F. Supp. 834 [Feb. 17, 1964]) wherein the Court said: "Distribution to creditors has been made under the foregoing plan and they have *received 100% of their claims in cash. There now remains in the hands of the Trustee the sum of approximately $300,000 for payment of the costs of administration and distribution to the common stockholders."* (p. 835)

not need a great amount of working capital but that it had ample credit lines available. He also stated that N. O. Nelson Co. could be sold or liquidated to yield in excess of $2,000,000.00. (N. O. Nelson Co. is now in reorganization under Chapter 11 of the Bankruptcy Act on petition granted by the Federal District Court in St. Louis on July 23, 1956.) Mr. Chamberlin spoke of government contracts for shell casings now in production and said that as the production of washing machines increased shell casing production would be diminished and ultimately stopped. He spoke optimistically of the number of washing machines which would be produced before the end of 1956 commenting on the fact that there were only eighteen makers of washing machines as contrasted with a large number of manufacturers of other appliances such as stoves and refrigerators. He said that the Automatic Washer was a superior product because it operated without vibration. He also made the point that the N. O. Nelson Co. distribution system would be able to distribute automatic washers advantageously. (If N. O. Nelson Co. is sold or liquidated, this would not be true.)" (A136a-7a)

The report as to McArthur of Bankers Life is of important significance; *it must be remembered,* that *Abrams had no connection whatever with Bankers Life or Automatic* after it was taken over on May 8, 1956 (pp. 16-21, *supra*):

"Mr. Chamberlin stated that N. O. Nelson Co. had been placed in Chapter 11 reorganization, *with the approval of John McArthur who is now the principal stockholder of Automatic Washer,* to protect it against its creditors pending decision as to whether it should be sold or liquidated. (Outside of this reference to Mr. McArthur by Mr. Chamberlin, the former's name was hardly mentioned during the conference except *in a brief recital by Mr. Chamberlin that Sidney Albert was short 600,000 shares Auto-*

matic Washer stock due Mr. McArthur and that a considerable 'mess' regarding this shortage would soon break. He indicated that this involved Albert and McArthur and not the Company.) Mr. Chamberlin also said that almost daily he received telephone calls from banks or brokers inquiring whether he did not personally wish to buy blocks of Automatic Washer stock held by the inquirers as collateral to defaulted Albert loans made by them. He said that he had purchased 80,000 to 90,000 shares of Automatic stock from such sources but, as he put it, 'was running out of gas' " (A137a-8a).

Nor can the importance of the following be underestimated in view of the distorted picture presented to the jury, that the N. O. Nelson acquisition involved a "looting" operation (M103-4, 111*):

> "At Mr. Day's request Mr. Chamberlin agreed to write a letter to the President of the Exchange. Mr. Day informally sketched the content of the letter to be written by Mr. Chamberlin substantially as follows:
>
> 'In answer to your inquiry based on Walter Hawes' investigation of Automatic Washer and its operations, regarding our Company's need of working capital, you are hereby advised that it is our intention to sell off the N. O. Nelson Co. within a thirty day period. We believe we can realize at least $2,000,000.00 even though it is sold under the hammer. However, if this sale does not materialize, I have at least $2,000,000.00 available that can be

* Small wonder that Judge TYLER was constrained to charge the jury: "To cut away the unnecessary elements of this dispute, let me state plainly that defendants are not on trial here for looting N. O. Nelson or any other company or making contracts or financial arrangements of the kind which are revealed at least in part by the evidence and for which purposes and standing alone were legal. Nor are they on trial for causing N. O. Nelson or Automatic Washer Company to go into reorganization proceedings, even if the evidence does show that these companies did go into such proceedings in the latter part [July] of 1956 or later." (A372a)

put into Automatic Washer. You are hereby assured that the Company is not insolvent and that it will have working capital for the future one way or the other.'

Mr. Day agreed that this letter would not be publicized by the Exchange." (A138a)

The report concluded:

"The meeting broke up at 5:15 P.M. As we were leaving *Mr. Chamberlin spoke again of the large amount of Automatic stock owed Mr. McArthur by Mr. Albert and indicated he did not know where Mr. Albert was going to be able to acquire such a large number of shares to cover his short position.* Mr. Halstead gratuitously commented that if an attempt was made to cover the short position on the Exchange and a run-up or unorderly market was caused thereby the Exchange would have to suspend trading". (A140a)

The report obviously was of crucial and compelling importance to the defense. It buttressed the incontestable position taken by petitioners that on and after May 8, 1956, when Bankers Life obtained control of Automatic, and when neither Abrams nor Richland had anything whatever to do with any "control person", and when Albert had no connection therewith, the sale of Automatic stock by petitioners could not possibly have involved any "control person", nor in any respect been involved in any conspiratorial activity.

The authenticity of the report was conceded by Government counsel (M8776-7, 8830, 9008). Judge TYLER expressly ruled: *"Of course that is kept in the regular course of business"* (M9268-9); *yet the report was excluded* (M9008; A85a-94a)! It is inconceivable that a document of such importance was not known to the Government or that the original or a copy thereof was not in its posses-

sion. Inquiry directed to that end (M9265-6) was foreclosed by the Court's statement: "*I am assuming for the purposes of your application, that it has been in their [Government counsel] possession throughout*" (M9270).

The Court was advised by defense counsel, "we could not get anything from the Midwest Exchange in order to check on some of the matters that are relevant here" because Government counsel had "all of these things in their possession right within the confines of the jurisdiction of this court" (M73). Government counsel indeed advised the jury that "[t]he Midwest Stock Exchange plays a role in this case because Automatic stock was listed and sold on the Midwest Stock Exchange"; that "it is a large exchange" and "for all purposes relevant to this trial" it is the equivalent of the New York Stock Exchange (M108). After the Government's opening, defense counsel promptly asked the Court "to direct Government counsel in the light of counsel's opening to make available for our immediate inspection the records that they have in their possession involving the Midwest Stock Exchange" * (M156-7). Although such directive was ultimately issued when the trial was under way,** the report was not made available to the defense by the Government. We ultimately obtained a copy pursuant to subpoena. The report should have been allowed into evidence, its authenticity having been conceded, and the Court having noted upon the record the unassailable assumption that it was kept in the regular course of business (M8776-7, 8830, 9268-9).

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* The record shows: "Mr. Gottlieb: These are files that we would be entitled to subpoena if they were in the possession of the people that own them. We would have as much right of access as the government, but the government has them" (M157).

** The Court: "Mr. Gottlieb, I think you are the very one that asked that this be done, so please remain. * * * First of all, the Midwest Stock Exchange records which are in your custody, Mr. Elsen, should be made available in an office or room in your office on Monday next, the 11th of November, now known as Veterans day" (M4683).

Certainly "the minimum requirements of admissibility were clearly satisfied" (*United States* v. *Re*, 336 F. 2d 306, 313 [2 Cir. 1964], citing *United States* v. *New York Foreign Trade Zone Operators, Inc.*, 304 F. 2d 792, 796 [2 Cir. 1962], to which Judge Tyler's attention was specifically directed [A94a], a decision also recognized as a controlling precedent; *United States* v. *Blum*, 329 F. 2d 49, 51 [2 Cir. 1964]; *Salsberg* v. *Modern Transfer Co.*, 324 F. 2d 737, 739 [2 Cir. 1963]).

The manifest importance of the report must be gauged by the fact that it was not made by anyone aligned in interest with the defense, but originated from the officials of a completely independent and objective body, the Midwest Stock Exchange, most vitally interested in the trading in Automatic shares and whether continued trading was calculated to affect the public adversely. The exclusion of the report was grave and prejudicial error, which of course permeated the conspiracy as well as the substantive counts, as will be apparent.

5(f). *It was error to instruct the jury that each of the 103 substantive counts charged "the commission of a separate crime" and "each count charges violation of or conspiracy to violate the Securities Act of 1933"* (A300a, A301a); *all substantive counts should have been consolidated into a single count or the Government required to elect one count on which to prosecute* (A73a).

The jury was given the indictment as a guide for their deliberations (A386a) after the charge had twice emphasized that *"each count charges the commission of a separate crime"* (A304a, A380a). Both prior to, during and at the conclusion of the trial, defense counsel moved that the substantive counts be consolidated into one or, in the alternative, the Government be required to elect one of the substantive counts on which to prosecute (M10974-5-6), a con-

tention likewise advanced on our post-verdict motions (A73a). That relief should have been granted (*U.S.* v. *Ketcham,* 320 F. 2d 3, cert. den. 375 U.S. 905). The record demonstrates that the multiple substantive counts were merely alleged variants of a single offense—the unlawful sale of unregistered stock of Automatic. The denial of such relief confronted the jury with a prolix pleading branding petitioner with having committed a great many separate crimes; such, indeed, was the impact of the court's charge (304a, 38a).

The record presents this bizarre situation. Carusi's ten sales of his 1,000 share block was effected in 100 share units within a two week period on substantially ten successive days (M2005; Gov. Exh. 5-G-35); the indictment and the bill of particulars so indicate (A45a, 67a). He sold his stock through Hentz & Co., one of the world's largest brokerage firms (M8296-7, 8326; Gov. Exh. 5-G-35). A broker in selling stock, as the testimony indicates, does not dump it on the market all at once but uses discretion in effecting daily sales, in order not to hurt the stock or cause a sharp break in the market (M8383). Such is recognized and proper brokerage procedure (M2850-1) and quite evidently was followed here. The grotesque result is that there evolved from the sale of a single block of stock under these circumstances, *which the broker alone controlled;* numerous separate crimes, that the indictment attributed to petitioners and so presented to the jury in the Court's charge (A304a, 380a).

Ketcham vindicates our position, although presenting a situation less persuasive than that found here. There, a Government employee was charged in eight counts of receiving "eight separate amounts totaling $130,656.11" in violation of 18 U.S.C. §281 (superseded by 18 U.S.C. §203), making it a crime for a federal employee in any matter pending before any Government department or agency, to

receive directly or indirectly any compensation for services in connection therewith.

Judge FRIENDLY stated that "[t]he reasons for requiring the government to elect among counts in some cases are, rather, primarily those of promoting the order and efficiency of the trial and *avoiding the risk that 'the prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes'*". The opinion further noted that whether there should have been consolidation or election "either before or after the close of the evidence is not before us" since the lower court had dismissed the complaint, an improper remedy (p. 8).

Although this indictment contains 104 counts, as Judge CASHIN noted in his opinion on pretrial motions, *all of them* "relate to the sale of common stock of the Automatic Washer Company" (*U.S.* v. *Abrams,* 29 F.R.D. 178, 180). Government and defense counsel present when this case was to be assigned for trial heard Chief Judge RYAN express concern as to the indictment's prolixity. Judge RYAN then observed that the trial of this indictment ought to be encompassed within approximately ten days and could see no reason why the Government could not and did not rely on but a few counts. Indeed, Judge RYAN mentioned by way of illustration a prosecution in the state courts involving larceny of thousands of dollars of nickels from New York City's subway system over a period of years, which it was held constituted a single larceny. Research revealed that the case was *Peo.* v. *Cox,* 286 N.Y. 137 [1941]. Our memorandum in pretrial proceedings before Judge TYLER, to whom this case was then assigned, specifically directed attention to these considerations and to Judge RYAN's observations, and specific reliance was placed by us on *Ketcham.*

We are not here concerned with whether multiplicitousness placed petitioners in jeopardy of multiple sentences. Our reliance on *Ketcham* plainly indicated that consolidation or election was clearly calculated to promote order and efficiency at the trial. Fully as important we also sought to avoid what Judge FRIENDLY aptly described as the "psychological effect" upon the jury that was conveyed to it by this multiplicitous indictment and, indeed, by the Court's charge that each count represented a separate crime (A304a, 380a) and that the jury had before it defendants accused of many transgressions. *Ketcham*, quoting this Court, recognized that "at the conclusion of the Government's case the defendant may insist that all the counts are merely variants of a single offense" (*Ketcham*, p. 8 citing and quoting *U.S.* v. *Universal CIT Credit Corp.*, 344 U.S. at p. 225). This indictment in its multiple counts alleged merely variants of a single crime, namely, the alleged illegal sale of Automatic unregistered stock.

5(h). *The refusal to give proper instructions as to the crucial date of May 8, 1956 when Bankers Life obtained exclusive control of Automatic, after which petitioners were in no wise involved in the company's internal affairs was grave error; the erroneous rulings were not limited in their impact to the vital issue of control but equally important on the issue of conspiracy as well as to the defense of change of circumstances.*

The charge pointed out, "You will recall claims made by one or more counsel that May 8, 1956 is the most important date in this case" (A374a). The Court correctly observed that our contention was "that at least after May 8th Albert was not a controlling person of Automatic Washer and thus each defendant cannot be considered a statutory underwriter for the sale of or offer to sell Automatic stock charged against him here in the indictment and

on the evidence after May 8th" (A375a). The record shows:

> "Mr. Tepper: Your Honor indicated to us that you would charge No. 55a, which reads:
>
> 'I charge you that neither Abrams nor Richland Securities was in control of Automatic Washer prior to May 8, 1956.' (A549a, 566a)
>
> *Your Honor did not so indicate* [in your charge*]." (A413a)

There was no basis for allowing the jury to speculate as to whether Bankers Life took control of Automatic after May 8, 1956 (A374a-5a). Judge TYLER graphically acknowledged that it was "clear to the point of being nauseatingly boring that there was a complete change" in the directorate of Automatic and, perforce, in the control of Automatic's corporate affairs after that date (M9800-1; see also pp. 16-21 *supra*).

United States v. *Sherwood*, 175 F. Supp. 480, ruled that there is "no authority for a holding that shares once owned by 'control' persons retain 'control' characteristics in the

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* Defense counsel was correct in the above italicized statement (A566a). The record further shows:

> "I respectfully except to your Honor's [not] pointing out to the jury the fact that control of Automatic Washer stock was first acquired on April 6th by Mr. Albert or his company and then lost on May 8th, which was only a period of one month. I don't think the jury has had an adequate presentation of that state of facts which is undenied on the record."

The Court refused the following request to charge:

> "55. I charge you that there was a complete change in the board of directors of Automatic Washer after Albert and Bellanca sold and transferred the block of 500,000 shares to Bankers Life in accordance with the agreement of May 8, 1956 (see Court's comment at p. 9801). Automatic Washer accordingly was then under new management. A corporation is managed and controlled by its board of directors. I charge you that neither Albert nor Richland Securities was in control of Automatic Washer after May 8, 1956." (A549a-50a, 566a)

hands of subsequent owners" (p. 483). Our footnote* quotes the very meager reference made in the charge to the factual context of this record insofar as it depicts the controlling position occupied by Bankers Life after May 8, 1956. The crucial date of May 8, 1956 was not limited in its impact merely to the issue of control, but was fully as important, on the issue of conspiracy. To neither issue, could the jury give adequate consideration under the cursory treatment that the charge evinces. The court had no *hesitancy in commenting that "[t]here does not seem to be any controversy that Automatic stock was not registered with SEC during the relevant years"* (A312a), which the charge included as one of the "four essential elements" *that the government must prove.* The jury should have been instructed similarly that there does not seem to be any controversy as to Bankers Life control position after May 8, 1956.

Finally, it is noteworthy that Robert J. Sugrue, a defense witness, a lawyer of wide experience in SEC matters (M9146) having been employed by that agency from 1941 to 1955 (M9138-9) and thereafter a member of a leading

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* After noting that the defense regarded May 8, 1956 as "the most important date in this case" the Court told the jury that that may or may not be so "according to how you determine the facts in accordance with my instructions on the law" (A374a). After referring to the May 8 agreement, the Court charged the jury:

"From this defendants argue that at least after May 8th Albert was not a controlling person of Automatic Washer and thus each defendant cannot be considered a statutory underwriter for the sale of or offer to sell Automatic Washer stock charged against him here in the indictment and on the evidence after May 8th.

The government disputes this by saying that the evidence shows that Bellanca and Albert never delivered a balance of approximately 612,500 shares to Bankers Life and that thus Albert remained a controlling person of Automatic Washer right up to October, 1956, the end of the period relevant to this indictment" (A375a). We called the trial Court's attention to the adjudications then already rendered to the contrary (*Bankers Life* v. *Bellanca Corp.*, 7 Cir. 288 F. 2d 784, 785; *Kirtley* v. *Bankers Life*, 198 F. Supp. 30, 31, 32 affd. 8 Cir. 307 F. 2d 418 [1961]; see pp. 18-20, *supra*).

law firm in Chicago which represented Automatic (M9142-3), rendered the following opinion on December 19, 1955:

> "6. The issuance, offering, sale and delivery of the shares of common stock under the circumstances contemplated by said agreement of December 8, 1955, constitute an exempted transaction under the Federal Securities Act of 1933, as amended, and the registration of said stock thereunder is not required. Since Pierce Governor Corporation and any persons, firms or corporations who participate with it in the purchase of common shares are purchasing the said shares for investment and not for distribution or resale, if the purchaser or any of its said associates should in the future deem it expedient to sell any of the said shares, which it does not now contemplate, any such sale would be an exempted transaction under the Federal Securities Act of 1933, as amended, and would not of itself require the registration of said shares under said Act, assuming that at the time of such sale the purchaser or any of said associates is not directly or indirectly in control of, controlled by, and is not under direct or indirect common control with, the Company or if such control then exists, such sale is not made to or through an underwriter as defined in said Act. Our opinion in this respect is in reliance upon the representation of Pierce Governor Corporation that said shares will be acquired for purposes of investment and not for the purpose of the distribution or resale thereof, and that its associates in said purchase, if any, will not exceed five in number." (Exh. DAR AA; M9144)

The sale of the shares by petitioners to which the foregoing opinion applied as we have already demonstrated, did not occur until long after Bankers Life acquired control of Automatic and, indeed, until long after Albert completely severed connection with Pierce Governor (M6955-6, 9891) and after McArthur authorized N. O. Nelson to file a petition under Chapter XI (A136a-7a).

6. *The indictment and bill of particulars admittedly confronted petitioners with defending a "highly technical" defense presenting, as the Court of Appeals noted below, the "narrow issue of illegally selling unregistered stock". Due process required that petitioners receive notice of the necessity to meet and treat with innumerable and divers transactions occurring over an extended period of years, long prior to trial* (A97a, 98a, 111a) *and which served to prolong this trial for 5½ months.*

The Government called 72 witnesses and introduced 600 exhibits (M11558). No indication was given to the accused that they would be confronted with a huge mass of collateral transactions injected into this case for the alleged purpose of establishing motivation or wilfullness in the sale of unregistered stock. If it were claimed that such statutory violation was designed to perpetrate fraud, the indictment and bill of particulars should have made that clear. They were not hastily drawn and came after 5 years of SEC investigation of this statutory violation (M2265). Since an indictment so limited is rare (*Loss, Securities Regulation,* vol. III, chap.12H, pp. 1993-4) it must be concluded that the absence of fraud counts was deliberate. If the strategy pursued at the trial by the Government was to use the technical violation in order to spring a surprise and inject into this case charges of alleged fraud and looting, that is constitutionally interdicted. *U.S.* v. *Beno* (324 F. 2d 582 [2 Cir. 1963]) reiterates that "the right to be tried for a specific offense" is "the very foundation of a criminal trial" (p. 589) and, moreover, the accused "is entitled to have his guilt or innocence determined on the specific offense charged and not risk the possibility of conviction" on the basis of "a series of prior specific acts" which collectively are designed to depict the defendant as lacking in commercial integrity. The Court in *Beno* properly emphasized that these principles lie at the "heart of our criminal law system" and constitute a "vital part of our definition of due process of law" of which a

defendant is denied when "an inordinate amount of incompetent evidence" finds "its way into the record and hence into the minds of jurors" and where, as here, the "narrow issue" was inundated, to use the language of *Beno*, by "voluminous testimony on specific collateral acts" (pp. 587, 589).

It is impossible to treat with all of the side issues and collateral transactions that served to augment this record beyond all reason. The situation is graphically reflected in the comments of Judge TYLER quoted below.* The repeated protests of defense counsel were unavailing (M85, 368-72, 2683-86, 2698-2710, 2797-2804). The Court did not stem the

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* "THE COURT: * * * You have got to have a little background. You just don't start in, boom! And then you go into motive. *But you just don't pour in 98 per cent of your case on these issues, and particularly when it is so tangential possibly and remote that it diverts us all from what we are really to get at.*" (M551)

"THE COURT: * * * So far as I am concerned, it seems to me that as to these particular records there is no point in us taking into evidence anything other than transactions which relate directly to one of the substantive counts. In other words, as a matter of discretion we have got to cut down somewhere, and *just to have these things pour in, this kind of documentary proof on similar acts,* let us assume arguendo it is similar act type proof, I think we are just getting to the point where it is ridiculous." (M2216)

"THE COURT: You see, Mr. Elsen, this is just what I am concerned about. Similar acts type proof I understand, but when you want to show a lot of mailings that are not even in the indictment, this I don't understand." (M2261)

"THE COURT: I am not moved by this and I must say that *that tends to fortify my suspicion that we are getting beyond any kind of reasonable bounds here,* even though I can see that it might be relevant in a general sense. * * * There is a lot of other evidence which could be construed one way or another. I am not attempting to construe anything. *I am just suggesting that pile upon pile upon pile of these documents creates a real problem even from your point. * * * It is not a matter of time that bothers me here. It is a matter of what is strictly relevant in the discretionary sense. I am concerned that we are going overboard here.*" (M2265-7)

"THE COURT: It does show that you must, as a minimum, have these things organized so that we know what counts we are talking about. I am not going to sit by here idly and let *mounds of documents* drift in in the form of blotter sheets and brokerage records." (M2318-9)

tide. At the close of the Government's case defense counsel specifically urged as prejudicial to the defense, the torrent of proof concerned with alleged "background" testimony and "related" and "similar" acts, under an indictment so narrow in scope, containing no charge of fraud (M7675-6).* At the close of the case the motion was renewed and again denied (M10947-59).

United States v. *Lo Bue Brothers,* 274 F. 2d 159, 9 Cir. 1959, cites the holding of this Court in *U.S.* v. *Illinois Central RR Co.,* 303 U.S. 239, 242-3, that in "statutes denouncing offenses involving turpitude 'wilfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication". It is noteworthy that in cases such as *U.S.* v. *Crosby,* 294 F. 2d 928 (2 Cir. 1961) and *U.S.* v. *Robertson,* 298 F. 2d 739 (2 Cir. 1962), *fraud counts were included* in the indictment; in *Crosby* the first count charged violation of 18 USCA §1343 pertaining to "fraud by wire", which "was incorporated by reference" into the mail fraud counts (p. 931) and the ever present conspiracy count (p. 932). In *Robertson,* the indictment charged a "scheme to defraud in the sale of securities using the mails or instruments of communication in interstate commerce in violation of 15 USCA §77q(a)(1)(2)", dealing with "fraudulent interstate transactions" (p. 14). In indictments embracing fraud

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* The record further shows: "MR. GOTTLIEB: I claim now, and my final motion which I respectfully urge upon this record, if all of this inundating, enormous amount of evidence which so far outweighs the limited counts in this indictment entail, I submit if their purpose is to show fraudulent intent and the authorities say that absent the fraud alleged under 77q, the real issue that is before the Court on the question of willful intent does not concern itself and cannot concern itself with alleged fraud, because if that were so then the requirement would be that the indictment present us with that issue. THE COURT: *I agree that there is no fraud count here. I am not talking about a fraud count.* It seems to me that intent, participation of people with one another is very important" (M7675-6).

and conspiracy to defraud, it is understandable that the prosecution would be granted broad latitude to establish the alleged fraudulent schemes in pursuance of which the alleged unlawful sales and unregistered securities presumably were had. No such situation existed here. This indictment was limited to *statutory* violations and alleged conspiracy to commit such *statutory* violations, "highly technical" offenses, as the prosecution properly characterized them (M2265) i.e. *malum prohibitum.**

N. O. Nelson Company. This is but one of the striking instances of how this indictment was perverted into a charge of fraud although devoid of any such allegation**, without just basis.

The Government's opening charged a "looting operation" (M103) and claimed that "Abrams entered into the

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* Loss quotes the following from *Crosby*:

> "It is always a difficult task in a complicated omnibus conspiracy case like this one to decide at what point the government has produced enough evidence against individual defendants to put their fates in the hands of the jury. *Because of the tremendous potential for collateral prejudice inherent in these cases, however, the courts must be extremely scrupulous in sorting out the evidence against single defendants and weighing the same—divorced from the all too often damning influence of the background conspiracy* (294 F. 2d at 942)." (Vol. II, Supp., p. 48)

In the original text to which the later supplementary note was added, Professor Loss observed:

> "It is conceivable, therefore, that 'wilfully' means something less in §15(b) than it does in the penal provisions of the SEC acts, and that it means something less when applied to a provision like §5 of the Securities Act, *which is malum prohibitum,* than to one of the fraud provisions, which more nearly approach *mala in se.*" (Vol. II, p. 1309)

** Petitioners' counsel vainly sought at the very inception of the trial to receive enlightenment as to "the so called collateral proof or background testimony so that we may be in some position to know how far in depth we will have to prepare and in particular *since there is no allegation of fraud* in connection with any of these actions, at what point do we stop and at what point should we be prepared to gather background proof" (M85-7).

transaction by which Nelson was acquired and * * * left Nelson a ruined shell sucking millions of dollars out of that company into their own pockets", and "the ruined shell of N. O. Nelson was dumped into Automatic Washer Company" (M106). Defense counsel protested "that the indictment makes no such charge" (M112).

The controller of N. O. Nelson, a Government witness, on cross admitted *that Abrams had nothing to do with that company* (M735-6*). Leo Bachle, a *Government witness,* associated with the company for more than 45 years and president for 19 years prior to his resignation on December 31, 1955 (M337, 386), testified that the company, a wholesale distributor of plumbing, heating and refrigeration supplies, had its main office in St. Louis, Missouri, with twenty branches throughout the United States (M338). During his long association with the company, it enjoyed *"very very profitable years"* except "for these two years 1953 and 1954" (M398). For the crucial year of 1955, the year-end after tax profit was $133,977.79 (M698), as shown by the auditors' report certified by the accounting firm of national repute, Ernst & Ernst (Applts' Exh. DAR-M; M698-707). Indeed, the report is *per se* an effective refutation of the Government's misstatements concerning the financial condition of the company. It shows total *current* assets of $9,872,956.84, as against current liabilities of $3,161,143.64, and a net worth of $6,826,045.70, *a far cry from a "looted shell", as Mr. Pabst himself was constrained*

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* The record shows: "Q. The final question I want to ask is, do you know Joseph Abrams? A. No, sir. Q. Did you ever meet him in any way in connection with any transaction involving N. O. Nelson? A. No, sir. (M735-6) * * * Q. Weren't you, as controller, familiar with every single dollar that went out of the company? A. Yes, pretty well, sir. Q. Certainly you will tell this jury Mr. Abrams, so far as you know, never got a dollar out of this company, did he? A. No." (M6760)

See also (p. 3 *supra*) Carmick's post-verdict letter to Judge Tyler.

to admit on cross (M733-4*). Mr. Bachle admitted on cross that the board of Nelson agreed to sell the company for slightly under $5,000,000, notwithstanding a book value of $7,000,000 (M399), because the four principal shareholders were well advanced in years and sought to set up trusts with diversified interests (M393-9).

The Nelson contract was made at Purcell's office and unquestionably was arrived at by arms' length negotiations (M1307-9).** The agreement dated December 23, 1955, provided that 96.7% of Nelson stock was to be acquired in consideration of 1,255,000 shares of Automatic (Gov. Exh. 3-7; M1009-12). Chamberlin then left for Honolulu and did not return to his office until the second week of January, 1956 (M1035). He received an urgent phone call from Keith Monroe, Nelson's president, advising him that Nelson was desperately short of working capital. Chamberlin promptly informed Abrams, who said "he was quite shocked to hear this" and "would immediately get hold of Mr. Albert and see what can be done" (M1036-7, 1377-9). It was from that point on, as the record conclusively and convincingly establishes, that the complete cleavage then developed between Abrams and Albert because Abrams promptly sided with Chamberlin, as the latter unequivocally testified (M1380-2).† According to Chamberlin, Abrams "after looking over

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* The record shows: "Q. If you turn to the second page, right in back of the one you just read, and at the very bottom of the page, it indicates, does it not, these certified public accountants did certify that net current assets over current liabilities for 1955 was $5,939,075? A. Yes. Q. So it had close to $6 million in current assets over liabilities in 1955? A. That is right. Q. Current assets as compared to current liabilities, the ratio was $3 of current assets for each dollar of current liabilities? A. That is right." (M733-4)

** Chamberlin testified: "Mr. Albert said, 'I think a fair price would be 1,500,000 shares,' and I argued with him and said it ought not to be a million. We argued back and forth. It wasn't an argument, we discussed it back and forth and finally settled on 1,255,000 shares" (M1308).

† Chamberlin testified: "Q. *He supported you on that issue against Mr. Albert, is that right? A. Yes, sir, he did.* * * * Q. Tell me

the situation, he felt too high a price was proposed to be paid, since it was not paid yet, by Automatic, and that we would have to obtain additional immediate working capital for Nelson, and those were my positions and he, as you said, supported me in those positions" (M1382). Not only did Abrams support Chamberlin, but the latter acknowledged that *Abrams "got the adjustments for us"* (M1383). It was a substantial adjustment (M1383-9).* These negotiations resulting in the ultimate adjustment were finally consummated by agreement dated April 6, 1956 (M1391-2, 1403). So bitter was the dispute that Chamberlin and Abrams, early in March, 1956, took a trip to the coast in order to consider a substitute for the Nelson acquisition, in the event Albert refused to make an adjustment (M1396-7); they checked into various substantial and thriving enterprises on the west coast (M1397).

Not only was $100,000 as aforesaid received by virtue of the adjustment, but on May 1, 1956, as Chamberlin testified, they actually received the 100,000 shares of Bellanca which

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so that we will have no dispute, what did Mr. Abrams say to Mr. Albert in your presence in support of your position, if anything? A. *Mr. Abrams specifically said that he felt that the situation was very critical and required something being done about it immediately,* and *that he fully agreed with my position in that regard.* Q. So he made no bones about *your being right* about it, is that right? A. He did not" (M1380).

See also (p. 3 *supra*) Carmick's post verdict letter to Judge TYLER.

* "Q. Tell the jury what was accomplished that you wanted to have done and that Mr. Abrams did accomplish. A. The price paid by Automatic for the Nelson Company was reduced as a result of my protest and Mr. Abrams' efforts from 950,000 shares plus the Albert note to, I think, 600-some-odd thousand shares of Automatic, plus the note. Of a promised $500,000 loan from Mr. Albert, we received $100,000 and we received as part of the transaction a hundred thousand shares of Bellanca stock which Mr. Abrams was able to get a loan on for us of a quarter of a million dollars or more. * * * Q. So that 100,000 shares represented an adjustment in your favor, according to market quotations, of $2,000,000, isn't that correct? A. Market quotations, yes, sir" (1383-4).

was then quoted between $18 and $20 a share (M1404-5).* That block of stock was employed to obtain needed financing to the extent of $250,000, which Chamberlin testified "was arranged some time between the 5th and 15th of May" (M1404-6). *It is important to note that this took place, as Chamberlin pointed out, "at the time that McArthur* [of Bankers Life] *came into the picture"* (M1406.) Indeed, Chamberlin said "McArthur was in the picture for quite a while before I knew it" (M1406). However, Chamberlin promptly acquainted McArthur with every aspect of the financial situation as to the need for working capital (M1794-5). An entry on the company's records in the handwriting of Pabst, Nelson's controller, in the month ending July 31, 1956, reflected a loan from Bankers Life to Nelson of $2,200,000 (M6744-5, 6750); the loan apparently was never effected. On July 23, 1956, Bankers Life filed the Chapter XI proceeding for the reorganization of Nelson (A137a). Throughout the trial, we voiced strenuous objection, when Government witnesses injected references to Nelson's Chapter XI bankruptcy involvement and alleged insolvency, presumably to support the Government's theory that this was a looted shell for which petitioners were in some manner accountable (M142, 6701-6703, 6832-8, 6890-6904), although neither premise was justified. Government counsel contended, "It is not inadmissible to state and prove that these companies went into bankruptcy", to which Judge TYLER responded, "I instructed the jury to disregard the question and answer" (M658-9); the Chapter XI proceed-

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* The Ernst & Ernst certified auditors report for Bellanca for the fiscal period ending June 30, 1956 reflected the transaction as follows in a footnote to the balance sheet: "In April 1956, Bellanca Corporation issued 100,000 shares of its Common Stock in acquisition of an additional 262,500 shares of Common Stock of Automatic Washer Company; the shares acquired were recorded on the books at a consideration of $2,100,000, equivalent to the approximate quoted market prices of the shares" (Applts' Exh. DAR-Q-1; M919-21).

See also (p. 3 *supra*) Carmick's post verdict letter to Judge TYLER.

ings were *authorized by McArthur of Bankers Life* (A137a, M670-1).*

Nelson never missed a payroll (M9958). Nelson *continued in existence and was still carrying on its business up to the very time of Pabst's testimony* on September 17, 1963 (M718-9). The order in the reorganization proceeding itself presents conclusive proof of Nelson's financial strength (Applts' Exh. DAR-DT, M10480).**

In view of the prosecutor's disparaging references in summation to the "Nelson Mess" (M11614), and his claim that "the N. O. Nelson Company was not a properly functioning company" (M11546), and "the Nelson transaction watered the stock of Automatic" (M11547), the Court's charge that petitioners were not on trial for looting N. O. Nelson, or for causing the reorganization proceedings both as to Nelson and Automatic, and *that the creditors of both companies were ultimately paid 100 cents on the dollar,* was wholly inadequate to offset the virulent and prejudicial distortions alluded to (A372a-3a).† Indeed,

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* "THE COURT: * * * I have no interest in hearing about a Chapter XI proceedings, because I think that is a little remote. * * * MR. GOTTLIEB: I simply want to call your Honor's attention to the fact in connection with *the Chapter XI proceeding, as I understand it, that not only was instituted by the new company in control,* but also ended with moneys being paid to the equity shareholders. So how can they say it is insolvent? THE COURT: * * * *I think the Government agrees that any details about Chapter XI proceedings are of no value here from anybody's point of view* (M670-1).

** "The plan for the reorganization of N. O. Nelson Company, the above-named debtor, submitted by the Trustee on June 19, 1957, and approved by this Court, in substance provides for: 1. The return to the debtor of debtor's property, subject to debtor's obligations as modified by the plan, and the continuance of debtor's business by debtor. * * * 3. The *payment in full,* without interest, of the claims of all unsecured creditors in the amount allowed by the Judge, less any amount owed by the creditor to the debtor or its Trustee." (Applts' Exh. DAR-DT).

† The Court charged: "As you recall, there have been many arguments arising from the claim of government counsel that N. O.

the charge quoted in our footnote made it the province of the jury to determine any involvement by these petitioners in the financial affairs of Nelson, when the undisputed testimony of Pabst is that they had nothing to do with any transactions involving that company (M6760).

The Court denied petitioners' motion renewed at the close of the case, to strike all the testimony pertaining to N. O. Nelson (M10986-7).

As a final example of the many cited below, we select the following as illustrative:

Nelson Company was looted, I think the word was, by defendants or someone. To cut away the unnecessary elements of this dispute, let me state plainly that defendants are not on trial here for looting N. O. Nelson or any other company or making contracts or financial arrangements of the kind which are revealed at least in part by the evidence and for which purposes and standing alone were legal. Nor are they on trial for causing N. O. Nelson or Automatic Washer Company to go into reorganization proceedings, even if the evidence does show that these companies did go into such proceedings in the latter part of 1956 or later. I instruct you, however, that the history of the Nelson acquisition, the Mastan and Heller financing, the negotiation and renegotiation of the Bellanca-Automatic Washer contract, the evidence bearing on the issue of Nelson Company's inability to meet its bills during the first months of 1956 and the fiscal picture of Automatic Washer Company during substantially the same period, as you determine the evidence to be on these subjects, may shed light on the knowledge and intent of the defendants you find to have participated in these transactions or have direct knowledge of them. To put this in further focus, you may find the evidence on these subjects relevant to the issue raised by the prosecution's contentions that Nelson and Automatic Washer were in such poor financial condition in the early months of 1956 as to make defendants or some of them unwilling to have Automatic Washer stock registered and thus disclose the facts to the public" (A372a-3a). The charge continues: "Let me mention one other point in this connection. The evidence does show that Nelson and Automatic Washer both, as I recall it, went into reorganization proceedings in July, 1956, or thereafter. It also indicates, as I recall it, that the creditors of both companies were ultimately paid in effect 100 cents on the dollar as far as the creditors' claims are concerned. As you know, as I have stated, the defendants are not on trial for causing these proceedings The only relevance therefor of this evidence, I instruct you now, is the light it may cast back on the financial situations of the two companies in the early months and into the summer of 1956 which are so much disputed by the parties in the area I outlined for you a few moments ago." (A373a)

Prejudicial error involving Gabriele Gurland, an indefensible Government witness.

The Court's charge included Gabriele Gurland as one of the "nine accounts" which the prosecution claimed Abrams used as "dummies" or "conduits" (A325a-6a). *Not mentioned in the indictment or bill,* she was presented by the prosecution as one innocently used, to effectuate alleged illegal sales of Automatic stock. The complete negation of that false presentation is a disquieting example of the inexcusable extremes used to fasten guilt upon petitioner.

On Government direct, Mrs. Gurland was shown an account with Hentz & Co. bearing her name and was asked, "Q. Did you ever have an account to your knowledge at H. Hentz & Co.? A. No"; also "Q. Did you ever own to your knowledge any Automatic Washer stock? A. No"; further, "Q. Did you ever have an account with Bernard Berk & Co. A. No"; shown a check and asked, "Q. Do you recognize it? A. No" (M2545-6). The documents were then offered in evidence by the prosecution (Gov. Exhs. 5-G-66/67; M2545) which in that state of the record if attributable to petitioners would convincingly establish shocking involvement of an innocent individual in a fictitious brokerage account used as a conduit for the sale of Automatic shares.

Upon the basis of defense counsel's revealing objections (M2548-50*), the Court as our footnote indicates, suggested

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* "(The following discussion took place at the sidebar out of the hearing of the jury:) MR. GOTTLIEB: Your Honor, these have to do with the Witkin defalcations and we cannot concede any phase of them. It is going to take us into an entirely new avenue. Witkin, as far as I understand, is the prime culprit in connection with this entire situation. MR. ARMSTRONG: That is a matter of proof as far as they are concerned. MR. GOTTLIEB: This lady is supposed to be Witkin's wife. You see why I can't. * * * THE COURT: You ask her about this record and whether she signed it and we will see what happens. You take this Exhibit 5-G-64 and ask her about it and then I will rule on these. MR. ARMSTRONG: These are business records in Hentz & Company. The relevancy, I think, is apparent. THE COURT: Ask her first about that." (M2548-50).

that Mrs. Gurland be questioned about the genuineness of the *signature* card essential to the opening of the brokerage account. She then for the first time acknowledged that the signature was hers (M2551), but *under Court inquiry* she said she did not recall signing the document (M2551*). More important, shown a check drawn by Hentz & Co. to the order of "Gabrielle Gurland" she denied that the endorsement was hers (M2553). She said she spelled her first name "with one 'L' and not with two 'L's' as spelled on this check". (M2553), which, as shortly will appear, was a proven falsehood.

On cross she testified that none of the transactions reflected in the documents offered in evidence by the prosecution did she ever discuss with Abrams; she said, "I don't really know who Mr. Abrams is"; she did not recognize him in the courtroom (M2556), and so far as she knew he had nothing to do with any of the transactions (M2557). She denied knowing Witkin; denied being married to Witkin; she knew he died in 1957. When asked, "Did you ever live with Mr. Witkin", the Court sustained the prosecutor's objection to that question (M2557). As to the check containing her disputed signature, she said that so far as she knew, Abrams had nothing to do with it (M2559). She denied having heard the name of Richland Securities Corporation or talked to Witkin about any of these transactions, nor did she know what job Witkin had in 1956 (M2560-1). At that point, as the record shows, "THE COURT: Do you by any chance know where Mr. Witkin was living and working? THE WITNESS: Where he was working I don't know, but we were living for a time in 1956 at the same address" (M2562); further, "THE COURT: In an apartment somewhere in the city? THE WITNESS: Yes" (M2563). Judge

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* "THE COURT: Do you recall signing that document? THE WITNESS: I do not. THE COURT: But that is your signature? THE WITNESS: I am pretty sure" (M2551).

TYLER himself was completely taken in (M2567-8).* However, after checking the authorities, the Court permitted defense counsel to inquire "into any business venture she might have had with Mr. Witkin", but he did not want counsel "to go into this proof of bad moral character" (M2583). The denouement quickly followed. Mrs. Gurland admitted that not only did they live in the same house, *but in the same apartment* (M2603-5).** She as well as Witkin had a key to the mailbox (M2609-10)! Irving Mandel, cashier of Hentz & Co., a Government witness (M2617) testified that a stencil for the name and address of each customer was made; there was one for Mrs. Gurland; in the ordinary course of business the usual notices and confirmations were mailed to her (M2624-5).

Mrs. Gurland persisted in her denial that the endorsement on the checks sent by Hentz & Co. (Gov. Exh. 5-G-67; M2623-4) on which the endorsement "Gabrielle" was written with a double "L" was her signature (M2593-4).†

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* "MR. GOTTLIEB: * * * I intended to move to strike them out at this point on the ground there really isn't, by her own testimony, any connection between these transactions and Mr. Abrams or Richland Securities insofar as he is in control of its affairs. THE COURT: *That is not why the government offered her. The government did not bring her in to identify documents in the classic sense. They brought her in to show she knew nothing about these transactions*" (M2567-8).

** The record shows: "Q. Was that the address at which Mr. Witkin also lived? A. Up to August, 1956, yes. Q. What apartment did he occupy? A. We lived in the same apartment, Mr. Gottlieb" (M2603-4) * * * "Q. And you also lived in the same apartment when you lived downtown on some 20th Street, is that correct? A. Yes. Q. What was the address of that apartment? A. It was on 19th Street and I don't remember the house number. Mr. Armstrong: I am going to object to this line of inquiry. The Court: So far as it has gone, I will allow it" (M2605-6).

† The record shows: "Q. And the only difference you say, the reason why you dispute the signature on the check is that it has two l's instead of one l, is that right? A. Yes, correct. Mr. Armstrong: Objection. A. (Continuing) I did not write it. Q. Do you have any idea who may have forged your name? A. No" (2593-4). * * * "Q. When for the first time were you shown this check on which you said the signature looked like yours but wasn't, Government's Exhibit 5-G-67? A. Yesterday. Q. So that yesterday was the first time in your life you saw this check? A. That's correct" (M2594).

Defense counsel retained a noted handwriting expert, Paul A. Osborn, whose report and findings as to the genuineness of the disputed signature were submitted to Government counsel (M10963), and that issue was resolved by a formal stipulation *in which the prosecution acknowledged that the signature was genuine!* (M9455-6; Applts' Exh. DAR-DP).

Finally and of controlling significance as to the grave error here committed, is the Court's refusal to permit cross as to whether Mrs. Gurland knew that Witkin had absconded with moneys, documents and securities belonging to Abrams (M2590-1). She denied attending at the opening of a vault at which Abrams and an attorney, Harold Garner, were present (M2591-2).* Garner was Witkin's close friend and attorney; he had also drawn a will for Mrs. Gurland (M8540, 8565). Mr. Garner was subpoenaed by the defense to appear while Mrs. Gurland was on the witness stand. Under subpoena by the Government, he had already been interviewed by the prosecution (M2576-85, 8556, 8576-81). Over the prosecutor's objection (M8514-38), he described the incident involving the opening of the vault in the summer of 1957 at which Mrs. Gurland and Abrams were present (M8554), and at which time she returned the purloined books, records and documents (M8554-6). John Young, representative of the First National Bank, identified the bank documents signed by Gabriele Gurland. The signature card indicates that the vault was opened on August 13, 1956 by Mrs. Gurland, (the precise time of the Witkin defalcation) and surrendered on August 11, 1958;

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* The record shows: "Q. Did you have a talk with Mr. Garner and Mr. Abrams about documents and moneys that Mr. Witkin had run off with? The Court: Sustained as to form. Did you ever have any conversations with Mr. Abrams concerning Witkin? The Witness: No. Q. Your statement to this jury is you were never at a bank with Mr. Garner and Mr. Abrams at the same time at which you were asked to open a vault? Mr. Armstrong: Objection. The Court: I will allow it. A. No. Mr. Gottlieb: We have asked Mr. Garner to be in court so she can identify him" (M2591-2).

it notes Harold L. Garner, attorney, as a reference (Applt's Exh. DAR-AY; M8204-7). These documents signed by Mrs. Gurland were part of the material upon which the conclusion as to the genuineness of the endorsement on the check was reached by the handwriting expert, Mr. Osborn, and which in turn furnished the basis for the aforesaid stipulation (M9455-6; Applt's Exh. DAR-DD Gov. Exh. 5-G-54).

Since the Government included Gabriele Gurland among the so-called "nine accounts" Abrams was charged with manipulating (M2622, 11729; A325a), defense counsel moved "to strike the Gurland testimony which your Honor now has admitted as to all defendants" (M7830-1); the motion was denied (M10963-6)!

7. *Petitioners were denied a fair trial in that Government counsel over repeated protest were permitted to examine witnesses giving favorable testimony for the defense in a fashion designed to indicate that such witnesses in private conferences made contrary statements to the prosecuting attorneys. Such tactics, uniformly condemned by judicial authority, enabled prosecuting counsel to make themselves unsworn witnesses for the Government and to support this prosecution by their own asserted but untested veracity* (A109a).

The course pursued was designed to give the jury the impression that an adverse verdict to the Government would be a challenge to the integrity of Government counsel. Such strategy has been condemned by the authorities. *Berger* v. *U.S.*, 295 U.S. 78, 88 [1935]; *People* v. *Lovello*, 1 N.Y. 2d 436, 439 [1956]; *Edgington* v. *U.S.*, 324 F. 2d 491 [10 Cir. 1963]).

The most flagrant of these instances occurred when petitioners requested that Bernard Berk be called as a court witness because of his refusal to produce document under subpoena and was reluctant to testify against the govern-

ment (M8295-9, 8743-5, 8962-6); he still had a lucrative interest in the brokerage house of Berk & Co. but had had no dealings with Abrams after 1959 (M8973-4). At a preliminary hearing not in the jury's presence, Berk testified that he was apprehensive about testifying (M8300-1). The prosecutor said in his presence, "[I]t is certainly in everyone's interest that Mr. Berk simply come in and tell the truth", and the Court responded "I am confident that he will attempt to do" (M8302). After Berk's direct was completed and his cross was still in progress a weekend recess intervened. On the intervening Saturday he was questioned by Government counsel at the U.S. attorney's office without notification or knowledge of defense counsel (M8757-8, 8766-7).* When the trial resumed Berk came into Court with his personal lawyer; limitations of space prevent us from portraying the bizarre situation that developed (M8767-75, 8780-84); Government counsel thereafter resumed the challenged type of questioning (M8795, 8871-12**) which reached the indefensible heights noted be-

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* By Mr. Elsen: "Q. Mr. Berk, is it not the fact that on Saturday of last week you appeared in my office with two attorneys and in the presence of Miss Holdridge and Mr. Armstrong and myself you stated that Joseph Abrams placed those orders by telephone? Mr. Gottlieb: I don't know whether they were trying to suborn perjury. It is improper to have that procedure with a witness who is on the stand and whom we have not seen, your Honor. If he had told it to the district attorney, it must have been untrue and a lie according to his sworn testimony before this jury" (M8757-8). * * * "Mr. Elsen: Saturday. He was in Florida until Friday night. The Court: *Did you have a stenographer present?* Mr. Elsen: No, we would not normally have a stenographer. The Court: I don't ask whether you normally would or not. I am just asking you factually, did you or didn't you? Mr. Elsen: There were five attorneys present, but there was no stenographer" (M8766-7).

** "Q. Mr. Berk, when you first came into the office you were advised of your constitutional rights, were you not? A. That is correct. Mr. Gottliebs I object to that as grossly improper. The Court: At this stage it is unnecessary. I will sustain the objection. Mr. Gottlieb: I will ask that the jury be instructed to disregard it entirely. The Court: Yes, they will be so instructed" (M8795-6) * * * "Q. (Continuing) And that you so

low (M8795-6, 8959, 8960-1).* The prejudice sought to be instilled was augmented by further improper interrogation designed both to create added bias in the minds of the jury and at the same time to serve as a threat to Mr. Berk, who as already noted (M8973-4) was still conducting a substantial and profitable brokerage business (M8923, 8925-6, 8927, 8928).** The same prejudicial procedure had been pursued with respect to prior witnesses; for convenience

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stated to Miss Holdridge and Mr. Armstrong? MR. GOTTLIEB: I object to the form of the question. If that is a preamble, I object to it. THE COURT: You two intertwine so closely it is impossible for anybody to understand or say anything. Now you go back, Mr. Elsen, and ask a simple question. You let him finish, Mr. Gottlieb. Maybe we will get done here sometime. Q. Mr. Berk, did you state on Saturday that you had not wanted to admit that you asked Raymond to leave because you did not want to disparage anybody? MR. GOTTLIEB: I object to that as highly improper. Q. Did you say that? Yes or no. THE COURT: I am going to sustain an objection as to the form of that. I would agree with Mr. Gottlieb that the last part of that is totally unnecessary, in any event" (M8871-2).

* "Q. I take it, Mr. Berk, that you recall at the very beginning after you were told about your rights that no promises or threats were made. You were asked if you understood your rights. Do you remember that? MR. GOTTLIEB: I object to that. I object to the form of the question. THE COURT: Sustained as to form." (M8959)

"Q. Mr. Berk, isn't it the fact that if you admit that you took these orders from Abrams and have no powers and his relatives don't back you up, that you were in trouble with the New York Stock Exchange, and that this is the motive for your testimony and that is why you lied on this stand, and that is why you claim you were coerced by your lawyer and the United States Attorneys? A. That is the way you spoke to me last Friday. MR. GOTTLIEB: Your Honor— THE COURT: That question will be disregarded, and the objection, which I believe I perceive— MR. ELSEN: Your Honor, this is cross-examination. THE COURT: Just a minute, sir. That question will not be permitted. It will be disregarded by you ladies and gentlemen, and I think we have come to the end of this line of inquiry. MR. ELSEN: I am at the end. THE COURT: This is it. You are absolutely right." (M8960-1)

** The record also shows: "Q. Did you recall that your father went to the SEC for an interview? MR. GOTTLIEB: Your Honor, I object to that as highly incompetent. MR. ELSEN: I am not going to read from it. THE COURT: Sustained. Q. Mr. Berk, I am going to show you pages 1414 and 1415. MR. GOTTLIEB: Your

illustrative instances are likewise noted below.* Petitioners' several motions for a mistrial were denied (M8782, 8928).

Honor, I must object to this procedure in view of your Honor's sustaining the objection. Q. I ask you to read the bottom of this page. THE COURT: Is this exhibit marked for identification? MR. ELSEN: I can mark it, your Honor. May this be marked for identification. (Gov. Exh. 5-G-89 marked for iden.)" (M8923) * * * "Q. Mr. Berk, do you have any idea if your father was taking orders from Joseph Abrams' relatives that you would never have heard of them? MR. GOTTLIEB: I submit that is grossly improper. THE COURT: Sustained. May I see this document? MR. GOTTLIEB: Counsel should be admonished, your Honor. MR. ELSEN: 1414 and 1415. I submit, your Honor, that this witness apparently needs some help. MR. GOTTLIEB: He doesn't need any help to tell the truth, and the District Attorney knows it and he ought to know it. From Saturday until today he ought to know. MR. ELSEN: I don't know how much help he has received. MR. GOTTLIEB: I don't know what attempts have been made to distort the truth" (M8925-6) * * * "(The jury and the witness left the courtroom.) THE COURT: You apparently don't understand what I assume is Mr. Gottlieb's basis for his objection, nor my ruling. *But there is nothing in those two pages to justify the question posed in the form you posed it.* MR. ELSEN: Your Honor, the transcript states—THE COURT: I know what it states. Now don't go into that. I just read it. *I am telling you that that question just isn't supported by the record so far as I can see.* I don't mean to cut you off, but that is just not a proper question. That is not what this man Berk Senior said at all." (M8927) * * * "THE COURT: Maybe that is so. But, in any event, the question is improper as to form. If you want to ask another question, ask it, but I am not going to allow this question. MR. GOTTLIEB: *So long as your Honor is ruling it improper as to form, may I note on the record my objection to this procedure, and I make a motion for a mistrial. The purpose of this was to show the father was brought before the SEC.* THE COURT: The jury does not know that. Mr. GOTTLIEB: He handed him this transcript and said that this was taken before the SEC. Does he think these people are naive? The purpose is to carry that over to the jury. MR. ELSEN: Is there anything criminal about going before the SEC?" (M8928).

* CECILLE DUBIN "Q. Didn't you tell us, Mrs. Dubin, at that time that in another proceeding you testified that a letter was dictated over the phone to you by Mr. Purcell? A. Yes. Q. *Didn't you tell us that that was false testimony?* A. I never— MR. CAHN: Objection. MR. GOTTLIEB: Objection. THE COURT: Sustained" (M10421). * * * "MR. GOTTLIEB: I will reserve a

Reasons for Granting Certiorari

The constitutional and legal questions enumerated (pp. 2-10, *supra*) far transcend the question of the guilt or innocence of the accused charged with this "highly technical" offense (M2265) involving the "narrow issue of illegally selling unregistered stock" (App. p. O-10, *infra*). More important, to contend that in order to prove guilt on that issue, required *a five and one-half month trial* borders on fantasy. It was in effect a trial by ordeal rather than in conformity with due process. This prosecution was not of the dragnet kind involving the operations of a subversive group or criminal syndicate. That type of prosecution is appropriately broad in scope in order to give the triers of the facts an adequate perspective to evaluate the nature and extent of the unlawful activities of the group and members thereof. No such situation obtained here. The defendants were few in number and were charged simply with the *statutory violation* of selling unregistered Automatic stock,—a transaction *malum prohibitum* and not *malum in se*.

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motion on that improper question. I don't want to delay it any further" (M10423).

NATHANIEL C. BEEBER, a Government witness: "Q. You were called by the United States Attorney. Were you asked whether you had had transactions in Pierce Governor? MR. GOTTLIEB: I object to that. THE COURT: Overruled. Q. Did you answer yes or no? A. No. Q. What name did you give as the person with whom you had the transaction? MR. GOTTLIEB: I object to the form of the question. THE COURT: What did you say? You talked to Mr. Elsen? THE WITNESS: Yes. THE COURT: What did you say to Mr. Elsen? MR. SINGER: I object to it, your Honor. There is no record, no transcript, no notice, nothing. This puts— THE COURT: Overruled. MR. SINGER: May I complete my objection? THE COURT: You certainly may. MR. SINGER: *This puts the prosecutor on the stand, and that is not permitted under the law, and the issue of credibility between Mr. Elsen and this witness cannot be tried in this fashion.* THE COURT: I agree, but we are not doing that. Overruled. MR. SINGER: I respectfully except. MR. GOTTLIEB: I join in the objection." (M5187-8)

Neither the indictment nor bill of particulars envisaged an omnibus prosecution such as developed here (A51a-71a). Defense counsel renewed their application for the production of the grand jury minutes to demonstrate "that those grand jury minutes should convince the Court that there was no need for a five-month trial; that the theory of the Government as reflected therein did not require an undue over-expansion of the issues which I respectfully claim resulted in a denial of due process so far as my clients are concerned" (M10967-70). The motion was denied (M10970). The trial Judge had the benefit of daily transcripts and made his own voluminous notes yet thought that the defendant Gordon, as to whom he granted a severance, was dead (M2686; p. 75, *supra*). When defense counsel sought to interrogate a Government witness concerning a director of one of the corporations here involved, the trial Judge erroneously assumed that that person had been a witness in this case (M9925-26). Toward the close of the trial one of the jurors was scheduled to go to Florida and as defense counsel observed "we are in no position to know how the pressures of these undue burdens will affect the jury's consideration" (M10972). Wholly aside from inundating the record with a mass of transactions and documents for the alleged purpose of furnishing background or proving motivation and intent, the defense was confronted with instances such as the prosecution reading to the jury 27 brokerage house blotter entries (M2698-2710) and lengthy transfer records which evoked the futile protest below (M2797-2804).* The situation here portrayed was graphically summarized by defense counsel at the close of the case

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* MR. GOTTLIEB: Your Honor, may I object to this procedure solely on the ground in the interest of saving time and in order not to unnecessarily prolong the case. How can anybody remember any of these numbers? It is just impossible. I feel we take up unnecessary time and the case is being lengthened to that extent and, I submit, this is a burden. How can anybody remember these things? (M2797-2798)

(M10970-73).* The burdens that a trial such as this imposes on the accused and counsel we respectfully submit warrant greater and not lesser concern. Surely the defendant's right to avoidance of error, particularly error of constitutional magnitude, should not be treated in inverse proportion to the length of the trial.

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* "MR. GOTTLIEB: * * * I simply take the position that it is humanly impossible, beyond a reasonable burden for a lawyer, no matter what his status is, or for a client, however affluent he is, or for a jury, however astute and sharp their mental capacities are, to give this case that kind of consideration which a trial in conformity with the reasonable standards of due process necessarily must and should exact or basically should provide. And, further, that the lawyers will not find themselves, as I have been, in the position of working day and night, as your Honor has. * * * But to work day and night with this kind of record and with the innumerable amount of transactions, some of which, if I may use the Court's characterization only recently, have been blown up beyond all due proportions, have made it impossible for a lawyer to give his client adequate representation, and for the client, without being impoverished or bankrupt, no matter how affluent he is, to sit here for six months away from whatever business he has." (M10970-72).

Petitioners' application for certiorari should be granted.

Dated: May 3, 1966.

Respectfully submitted,

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APPENDIX OF OPINIONS

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 98—September Term, 1965.

(Argued December 7, 1965 Decided March 4, 1966.)

Docket No. 29297

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH ABRAMS, SYDNEY L. ALBERT, and RICHLAND SECURITIES, INC.,

Defendants-Appellants,

DAVID SCHINDLER, LARRY KNOHL, CHARLES GORDON,

Defendants.

Before:

LUMBARD, *Chief Judge,*
SMITH AND HAYS, *Circuit Judges.*

Appeal from judgments of conviction for criminal violation of the registration requirements of the Securities Act of 1933, 15 U. S. C. §§77e(a), 77x and for conspiracy, 18 U. S. C. §371 entered in the United States District Court for the Southern District of New York after a trial before Harold R. Tyler, Jr., *J.*, and a jury.

Convictions affirmed.

Opinion of Court of Appeals

MICHAEL F. ARMSTRONG, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, David M. Dorsen, Neal J. Hurwitz, and John E. Sprizzo, Assistant United States Attorneys, New York, N. Y., on the brief), *for appellee.*

SAMUEL GOTTLIEB, New York, N. Y. (Louis A. Tepper and O. John Rogge, Gainsburg, Gottlieb, Levitan & Cole, New York, N. Y., on the brief), *for defendants-appellants.*

HARRY K. NADELL, New York, N. Y., *for defendant-appellant Sydney L. Albert.*

LUMBARD, *Chief Judge*:

Joseph Abrams, Sydney L. Albert and Richland Securities, Inc. appeal from their convictions by a jury in the Southern District of New York on numerous counts of an indictment charging use of the mails and other means and instruments of interstate commerce in selling to the public, during middle and late 1956, stock of the Automatic Washer Company for which no registration statement had been filed with the Securities and Exchange Commission, as required by law, and for conspiracy to violate the registration provisions of the Securities Act. 15 U. S. C. §§77e(a), 77x and 18 U. S. C. §371. Abrams was sentenced to five years imprisonment, Albert was sentenced to three years imprisonment, and Richland was fined $5,000.[1] Appellants

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[1] Abrams and Richland were found guilty on counts 2, 11, 17 through 25, 55 through 57, 75, 79 and 104. Abrams was sentenced to a term of five years imprisonment on each count, the sentences to run concurrently. Richland was fined $5,000 to cover all counts. Albert was found guilty on counts 80 through 82, 86, 90 through 96, 99 through 103 and 104. Albert was sentenced to a term of three years on all counts to be served concurrently.

claim that numerous errors requiring reversal of their convictions were committed during their trial which lasted from September 4, 1963 to February 15, 1964.

Of the claims which we think merit discussion, seven were briefed and argued for Joseph Abrams and Richland Securities, and adopted by Sydney L. Albert, and the eighth was briefed and argued by Albert, as follows:

I. The Sufficiency of the Evidence

II. Alleged Errors in the Admission and Exclusion of Evidence

III. Alleged Errors in the Judge's Charge

IV. Whether Abrams Secured Immunity by Testifying Before an Examiner of the SEC

V. Whether Abrams should have been tried by the Court instead of by the Jury

VI. Whether Abrams had a right to participate in the hearing after trial on Albert's mental capacity

VII. Whether a new trial should have been granted because of allegedly newly discovered evidence

VIII. Whether Albert's right not to testify was violated by an opening statement made by Knohl's counsel; whether the court should have granted a mistrial.

As we find ample evidence to support the convictions and no errors in the conduct of the trial, we affirm the convictions.

Opinion of Court of Appeals

I. The Sufficiency of the Evidence

The Indictment

The indictment, filed April 3, 1961, charged Abrams, Richland and Albert and co-defendants Larry Knohl, Charles Gordon and David Schindler with unlawful use, during various times in 1956, of means and instruments of communications in interstate commerce to sell the common stock of Automatic Washer Company, there not then being in effect with the SEC a registration statement as to said security. Knohl was tried with the appellants and acquitted by the jury, Schindler died prior to trial, and the charges against Gordon were severed and were later dismissed.

It was the government's contention that Abrams and Albert were "underwriters" of the Automatic stock, as that word is used in the statute, 15 U. S. C. §77b(11), since they purchased from the issuer with a view to selling or distributing the stock. Therefore, being underwriters, they violated the statute by selling stock which was not registered,[2] and for which there existed no exemption from the registration requirement of the Securities Act of 1933.[3] Thus, it was relevant on the issue of intent, purpose and willfulness for the government to show the interest of Abrams and Albert in the Automatic Washer Company and its stock and the financial arrangements and agreements which preceded their disposition of the many thousands of

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[2] 15 U.S.C. §77e, which reads in part:

"(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, . . .

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise . . ."

[3] 15 U.S.C. §§77c, 77d, and 77e.

shares of Automatic stock which they thereby acquired. We therefore summarize the record facts regarding:

Acquisition of Automatic Stock by Abrams and Albert

In February 1955 Albert acquired control of Bellanca Aircraft Corporation, then a corporate shell, by purchasing 82% of its stock. Upon becoming president and a director, Albert exercised complete control of its affairs. On March 10, 1955 Albert, for Bellanca, contracted to acquire N. O. Nelson, then a profitable plumbing supply concern with headquarters in St. Louis, Missouri, and its subsidiary, Joplin Supply Co., for approximately $4,800,000. To accomplish this Albert borrowed $4,000,000 for Bellanca from the Mastan Company for a "fee" of $500,000 and repayment in 11 months, with 6% interest. As security Albert assigned Bellanca's Nelson and Joplin stock, 100,000 shares of Bellanca stock, and gave guarantees of various companies, his wife and himself, and a guarantee of $500,000 by Abrams, for which he also pledged Bellanca stock to Abrams. After making two monthly repayments to Mastan —one by Bellanca and one paid by himself, Albert refinanced the Mastan loan through a loan of $3,600,000 to Nelson and Joplin from the Walter E. Heller Company. For this new loan Nelson and Joplin pledged all their assets. The borrowed $3,600,000 was transferred to Bellanca on December 5, 1955 and on the following day the Mastan loan, now $3,212,950, was retired and Albert received the balance of $387,050.

In late November 1955 Abrams had met John Chamberlin, president of Automatic, a washing machine company with its principal place of business in Newton, Iowa, which was then badly in need of financing. This led to discussions in early December as a result of which Albert agreed that his

company, Pierce Governor Company, would buy 330,000 shares of Automatic original issue stock for $2.55 per share, which was 15% under the then market price. As there were only 292,594 shares then issued and outstanding this arrangement would give Albert control of Automatic. Abrams and Schindler provided the money by finding purchasers for Pierce stock and by buying 100,000 shares of Automatic in the name of Richland.

On December 10, 1955 Automatic purchased the assets of the Washer-Dryer Corporation which was located in a garage in Skokie, Illinois, for 228,000 shares of Automatic which it was to issue and these shares were distributed to the shareholders of Washer-Dryer. Three days later, on December 13, Abrams suggested to Chamberlin that Automatic should buy Nelson which he said had a net worth of about six and half to seven million dollars. Abrams told him nothing about the $3,600,000 loan to Nelson and the mortgages of the Nelson and Joplin assets and accounts.

On December 22, Albert, Abrams and Chamberlin agreed that Automatic would issue to Bellanca 1,255,000 shares for Bellanca's ownership of 96.7% of Nelson's issued and outstanding stock. Albert arranged that of the Automatic shares to be issued to Bellanca, 305,000 shares would be issued to him personally in payment of a note for $1,525,000 which he caused Bellanca to make payable to himself. Albert then endorsed the note and delivered it to Chamberlin as the consideration for the 305,000 shares.[4]

To enable Bellanca to pay off the Mastan loan the parties arranged for Nelson to declare a $3,600,000 dividend pay-

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[4] Bellanca never owed Albert any such amount. Abrams computed the total worth of 305,000 shares at $5.00 per share and drew up the note which Albert signed on behalf of Bellanca. After the stock was issued to Albert, Chamberlin returned the note to Bellanca on the instructions of Abrams.

able to Bellanca on January 4. This required a revision of the December 22 agreement which had prohibited such a payment, but this was done about the middle of January by an agreement which was pre-dated to December 23. It was not until mid-January that Chamberlin first heard of the Heller loan. The result of all this was the depletion of Nelson's working capital.

On March 1 Bellanca issued a news release of its sale of Nelson to Automatic for 950,000 shares, the recent closing price of which had been 8⅛ on the Midwest Exchange. Although the release stated that Bellanca had received dividends of $3,466,800 from Nelson, nothing was said either about the Heller loan and the resulting serious financial condition of Nelson and Automatic or the 305,000 shares issued to Albert.

On April 6, 1956 Automatic delivered to Albert 105,000 shares which, with the 200,000 already delivered to him about February 23, totalled the 305,000 shares in payment of the so-called note to him from Bellanca. Automatic also delivered 950,000 shares to Rothschild, treasurer of Bellanca, who then gave 50,000 shares to one Hayutin, acting as agent for Abrams, and turned over the remaining 900,000 shares to Albert. Earlier, on February 21, Abrams had received 50,000 shares of Automatic in return for what Abrams alleged to be $300,000 worth of rubber machinery which Abrams claimed to own but which he never turned over to Automatic.

Thus, by early April, Abrams and Schindler had acquired 210,000 shares of Automatic and Albert had or controlled 1,435,000 shares—through Pierce and Bellanca—a total of 1,645,000 out of the 2,155,594 shares then outstanding. Abrams himself in a letter written to Albert's attorney, Albert Kahn, on March 2, characterized these transactions: "[T]he N. O. Nelson deal for Automatic is the worst kind

of robbery this side of heaven, insofar as the Automatic stockholders are concerned." And six days later he again wrote Kahn that "Automatic Washer is taking the most terrible beating that it could possible (sic) take in making the Nelson deal." These characterizations by Abrams could well have been found by the jury not to be overstatements of the truth.

Abrams and Albert Dispose of Their Stock

The evidence showed that Abrams disposed of 56,300 shares. He sold 7,000 shares for $21,000 to four or five friends in early 1956. Through accounts which he set up at H. Hentz & Co. for nine relatives and close friends, he sold 8,500 shares from April 30 to July 20, 1956. One of these, Gabriele Gurland, testified that she knew nothing about the account. From the testimony of the others in this group of nine the jury could well have concluded, as the government contended, that Abrams simply used their names without their knowledge and gave all the instructions to Robert Berk of Hentz & Co. Through the brokerage firm of Montor and Company, Abrams sold 40,800 shares in August, September and October 1956.

There was evidence that Albert distributed to the public 291,651 shares of Automatic which belonged to him or Bellanca by direct sales or by pledging the stock and causing it to be sold under such circumstances that the jury could find that the purpose was distribution to the public. The proof presented a question for the jury whether Albert had placed Automatic stock with five institutions, as collateral for the repayment of loans, with the legitimate intent to use the stock as collateral or whether so pledging it amounted to an indirect means of selling the stock as he never intended to repay the loans and knew that the stock

would be sold upon his default. The jury found Albert guilty of sixteen such transactions in 1956, as follows:

Count	80	Dreyfus & Co.	100 shares	May 28
	81	"	100	May 29
	82	Francis I. duPont & Co.	5,000	June 11
	86	Harvard Trust Co.	800	Sept. 18
	90	"	1,000	Oct. 5
	91	"	4,000	Oct. 8
	92	Lewis & Stoehr	15,000	May 11
	93	"	5,000	May 21
	94	"	400	June 13
	95	"	400	June 13
	96	"	200	June 13
	99	"	2,500	June 13
	100	"	500	June 13
	101	Meadowbrook National Bank	15,000	June 14
	102	"	10,000	Aug. 1-10
	103	"	5,000	Sept. 6-14

The proof showed that in the transactions with the Meadowbrook National Bank, Albert dealt through Larry Knohl who arranged to have the loan made to Knohl's son-in-law, Samuel Bankin. Automatic stock which had been supplied by Albert was put up as collateral and later sold out to pay off the loan on Knohl's orders.

The testimony of Walter White, vice-president of Equitable Security Trust Company of Wilmington, was striking evidence of the illegality of these pledge transactions. Albert told him that as he was a principal he could not sell

Automatic stock as this was prohibited by the SEC but that he had no objection if Equitable sold the stock for him.

There was ample evidence from which the jury could find the four elements which Judge Tyler correctly instructed them they must find in order to convict Abrams, Albert and Richland on the substantive counts. First, interstate facilities of communication had been used to sell the Automatic stock on the Midwest Exchange, and in some cases the mails had been used. Second, it was conceded that the stock had not been registered with the SEC. Third, there was evidence from which it could be found that Abrams and Albert were statutory underwriters and that consequently the stock was not exempt from registration. Fourth, there was abundant evidence of willfulness to violate the law, such as the misrepresentations to Chamberlin, Baradel and Masiello; the handling of the dummy accounts at Hentz & Co., Abrams' statements to Shiah Arsham about manipulating the price of Automatic stock[5] and the letters Abrams wrote to Kahn on March 2 and March 8, 1956, which we have referred to above.

II. Errors in the Admission and Exclusion of Evidence

Appellants complain that much of the proof admitted over their objection went far beyond what was properly relevant to the narrow issue of illegally selling unregistered stock. We disagree.

It was relevant for the government to show that the failure to file a registration statement was motivated by the desire of Abrams and Albert to conceal their fraudulent activities. It was necessary to a proper understanding and

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[5] Abrams told Arsham that he and Schindler would "control," "head up" and "manipulate" the market in Automatic stock and drive the price from 3 to 8 or 10.

decision of the charges to know how appellants acquired their Automatic stock and how they conducted the affairs of Bellanca, Automatic, Nelson, Joplin and other companies which they controlled. It was pertinent to show that these activities could not have withstood scrutiny by the SEC and that Abrams and Albert must have known that they could never have obtained registration of the Automatic stock by the SEC and therefore they had a motive for concealing their activities and the true condition of Automatic. We have so held when the fraud itself is at issue in counts in the case. See *United States* v. *Doyle,* 384 F. 2d 715, 720 (1965); *United States* v. *Guterma,* 281 F. 2d 742, 746, cert. denied, 364 U. S. 871 (1960); *United States* v. *Houlihan,* 332 F. 2d 8, 14-15, cert. denied, 379 U. S. 828 (1964). It is no less relevant on motivation where the fraudulent activities, if revealed, would prevent SEC registration.

For the same reasons the letters of March 2 and March 8, 1956 from Abrams to Albert's attorney, which characterized the Nelson deal as "robbery" and as a "terrible beating," were clearly relevant on the question of intent and willfulness. Likewise, the testimony of Shiah Arsham that Abrams told him in late December or early January 1956 that he and Schindler would "control" and "manipulate" the Automatic stock was properly admitted.

Appellants complain of the exclusion of certain evidence, in particular a report from the Midwest Stock Exchange, and the refusal of the trial judge to direct the government to turn over to counsel a deposition of one Louis Carmick, a Chicago attorney. The Midwest report was properly excluded because it was nothing more than a collection of hearsay statements, opinions and conclusions. Even on the assumption that the document might have been admitted as a business record, which theory to us seems highly doubtful, Abrams as the moving party had the burden of showing

that the document qualified under 28 U. S. C. §1732, the statutory business record exception. He never offered to do so and hence, the document was properly excluded.

As for the Carmick deposition, we find that the court did not commit error when it refused to direct the government to turn over this document to Abrams' attorney while Chamberlin was on the stand. We find no authority for the proposition, advanced by Abrams, that hearsay statements by a third party may be introduced to impeach a witness. The court made it abundantly clear that if Abrams wished to obtain the document for any purpose, he could always obtain the document by serving a subpoena and using the document as best he could. In any event, Carmick was always available to be called as a witness and the defense chose not to call him. Thus, the deposition was properly excluded.

III. Alleged Errors in the Judge's Charge

Abrams claims that counts 2, 11 and 17 through 21 of the indictment were barred by the five-year Statute of Limitations, 18 U. S. C. §3282, and that it was error for the trial judge not to inform the jury that the "sales" from Abrams to Carusi and Gordon on March 14, 1956, were beyond the limit. We find that the jury was properly instructed that the government had to prove that the sales to the public occurred within the five-year period prior to April 3, 1961, the date of the indictment, and that Abrams could be found guilty only if he was responsible for the sales out of the nominee accounts, all of which occurred within the statutory period. There is ample evidence to support the jury's finding that the real sales to the public were made from the nominee accounts from April 24 through July 16, 1956 and hence, were within five years of the indictment.

Appellants also claim that the trial court committed reversible error when it charged that "if the defendants 'took

the Automatic Washer stock with the intention at the time of taking it to sell to the public, the fact that such defendants later suffered a severe change in their personal circumstances before they actually sold it to the public is not relevant and will not keep them from being guilty as statutory underwriters.' " Appellants claim that, in effect, they were punished for criminal intent, "notwithstanding that the act at the time of its execution was legal."

The Securities Act of 1933, 15 U. S. C. §77b(11) defines an underwriter as one who takes from an issuer with a view toward distribution. Thus, if Abrams and Albert took stock from Automatic with an intent at the time of the taking subsequently to distribute the stock to the public, they could be considered to be underwriters.[6] If, in fact, they were underwriters, any transaction involving the stock so taken from Automatic could not qualify for exemption from registration under §77d(1). And, distribution of stock which was not registered with the SEC was prohibited by §77e(a)(1), a violation of which subjected Abrams and Albert to criminal liability. They were not punished, as Abrams contends on appeal, for having an intent to distribute when they took the unregistered Automatic stock, but for the subsequent distribution itself.

The "change of circumstances" doctrine to which appellants refer, is wholly inapposite. That doctrine applies to the situation where the original taking of unregistered stock is for investment purposes. If subsequently, there is a change in the financial position of the taker such that the holder is forced to raise money by selling the stock to the public, the courts have said that if the change of circumstances was wholly unforeseeable at the time the stock was originally taken, then the unregistered stock may be dis-

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[6] See, 1 Loss, *Securities Regulation* (2d ed. 1961), pp. 547-557.

tributed without penalty to the seller.[7] The defense that the sales of unregistered Automatic stock were necessitated by the defalcations of Witkin, Abrams' confidential employee, is one which the jury could well have disbelieved. On the other hand, as we have stated above, there was much evidence to show that Abrams and Albert took the stock with an intent to resell to the public and hence, were statutory underwriters who were required to see that a registration statement had been filed before they could distribute Automatic stock to the public.

IV. Whether Abrams Secured Immunity by Testifying Before an Examiner of the SEC

Abrams claims that because he appeared before the Regional Office of the SEC in response to a subpoena *duces tecum* on June 19, 1956 and on five subsequent occasions, and because he gave testimony regarding purchases and sales of stock and business transactions concerning Automatic, Bellanca, Pierce Governor and other corporations he secured immunity by reason of 15 U. S. C. §77v(c)[8] and

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[7] See, 1 Loss, *Securities Regulation* (2d ed. 1961), pp. 665-667.

[8] 15 U.S.C. §77v. Jurisdiction of Offenses and Suits

"(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or of any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

that it was error for Judge Tyler to deny this claim.[9] We do not agree.

Abrams gained no immunity by merely appearing in response to a subpoena. The statute expressly confers immunity only as to those matters concerning which a witness is compelled to testify after he had claimed his privilege against self-incrimination.[10] Abrams was not compelled to answer any questions as to which he claimed immunity. The only questions he answered were those as to which no claim of privilege had been made. He gave no testimony at the first hearing and at all five subsequent hearings he appeared with counsel. In fact, the record clearly refutes any possible claims of compelled testimony in violation of Abrams' Fifth Amendment right against self-incrimination, for on October 1, 1957, when Abrams and his attorney, Ganson Purcell, a former Chairman of the SEC, appeared before Senior Trial Attorney Arthur Goldman in the New York Regional Office of the SEC, the following transpired:

> "Mr. Goldman: As you know, Mr. Abrams, this is an investigation of the Commission to determine whether any of the Acts administered by the Commission have been violated, more particularly Sections 5 and 17 under the Securities Act of 1933, Sections 9 and 10 under the Securities and Exchange Act of 1934.
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> "As you may know, these Sections generally deal with registration requirements in the sale and distribution of securities, fraud in the sale and offer of sale of securities, and manipulative practices used in trading securities.

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[9] We note that although Abrams appeared before the Regional Office of the SEC in 1956 and the indictment was returned in 1961, that the claim of immunity was not raised until January 3, 1964, four months after the trial started. Thus, Judge Tyler could well have denied the claim of immunity on the ground that it was made too late, but he chose not to do so.

[10] *United States* v. *Monia*, 317 U. S. 424, 429 (1943).

"Let the record show that Mr. Abrams appeared here on June 19, 1956, June 21, 1956 and July 5, 1956.

"As you will recall, Mr. Abrams, you took the Fifth Amendment with respect to the more substantive questions I asked you on those occasions.

"I want the record to show that Mr. Abrams appears here voluntarily with the understanding that he is not going to plead the Fifth Amendment. I use the term 'voluntarily' not in its usual context.

"As you understand, you are still under subpoena, Mr. Abrams?

"Mr. Abrams: Yes.

"Mr. Goldman: I want the record to show this arrangement was volunteered.

"As you know, you still have the right to refuse to answer any questions on the grounds that it may incriminate you or subject you to fine, penalty or forfeiture. I do not want to create a situation here where you are being forced to waive your right to plead the Fifth Amendment.

"I take it here that you are represented by Mr. Ganson Purcell as your counsel.

"Mr. Abrams: That's correct.

"Mr. Goldman: Under these circumstances, I take it that you are willing to testify?

"Mr. Abrams: I am, sir.

"Mr. Goldman: Would you be good enough to take the oath?"

Abrams' position is that once an individual is subpoenaed to appear before an investigative body and that individual refuses to answer one single question on the grounds that the answer might tend to incriminate him, then the individual is forever immune from prosecution of

any kind which stems from the conduct then under investigation. In the alternative, Abrams argues that if the individual pleads the Fifth Amendment at any given hearing and then voluntarily testifies as to the subject matter of the heretofore allegedly privileged answer, then no matter how false and self-serving the answer is, the individual may not be prosecuted for the conduct which was then under investigation.

The statute is plain and unambiguous. It requires that a claim of privilege against self-incrimination must be made by an individual *and* that, thereafter, the individual *must be compelled* to testify or to produce records for inspection by the investigative body. Abrams never made a contemporaneous claim of privilege when, on those occasions, he did testify, and, in no event, was he ever compelled to answer any question as to which he claimed his privilege. We find Abrams' claim of immunity to be without merit.[11]

V. Whether Abrams and Richland Should Have Been Tried by the Court Instead of by the Jury

Abrams argues that it was error for the trial judge to refuse to grant his motion for a limited severance because of the antagonism of his co-defendant, Albert. This claim is answered by our decision in *United States* v. *Cohen,* 124 F. 2d 164 (2 Cir. 1941), cert. denied, 315 U. S. 811 (1942) where we held that, ". . . the granting of such motions is within the discretion of the trial court and, where the charge against all the defendants may be proved by the same evidence and results from the same series of acts . . .

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[11] Compare, *United States* v. *Charles Pfizer & Co.,* 245 F. Supp. 801 (S. D. N. Y. 1965) involving 15 U. S. C. §§32, 33, an entirely different immunity statute.

the discretion should not be interfered with." 124 F. 2d at 165-166. In the alternative, Abrams argues that his motion for a trial to the court, predicated on the complex nature of the transactions and the statute underlying the indictment, was erroneously denied, even though the government refused to waive a jury trial. This argument was foreclosed by the Supreme Court's decision in *Singer* v. *United States,* 380 U. S. 24 (1965) where the Court held: "A defendant's only constitutional right is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refused to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him." 380 U. S. at 36.

VI. Whether Abrams Had a Right to Participate in the Hearing After Trial on Albert's Mental Capacity

After the verdict and before sentence, counsel for Albert moved for a hearing, pursuant to 18 U. S. C. §4244, to determine whether Albert had been competent to stand trial. Judge Tyler held a two-day hearing and found that Albert had been competent. Although Albert does not appeal from this ruling, Abrams complains that the trial judge erroneously denied his motion to participate in the hearing.

Judge Tyler directed that all pertinent medical reports and written material be made accessible to Abrams and he even offered to allow representatives of Abrams to attend the hearing. However, because he felt that the presence of additional parties would unnecessarily complicate what was already a protracted litigation and because counsel for both Albert and for the government strongly opposed

Abrams' intervention, Judge Tyler denied Abrams' motion to participate.

Abrams has not made any showing that he could have been prejudiced by having been denied the right to participate in this hearing, or how his participation would have made one iota of difference or that he was denied any information which could possibly have been relevant to his defense.

VII. Whether a New Trial Should Have Been Granted Because of Newly Discovered Evidence

Abrams alleges that the trial judge committed error by refusing to grant a post-verdict motion for a new trial made on the basis of newly discovered evidence. Rule 33, Federal Rules of Criminal Procedure. This evidence consisted of two letters and an affidavit sent to the court by Louis Carmick, who had formerly been an officer of Automatic. Carmick had always been available as a witness and the appellants chose not to call him. The motion was properly denied.

It has long been held in this circuit that " . . . a defendant seeking a new trial under any theory must satisfy the district court that the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered before or, at the latest, at the trial." *United States* v. *Costello,* 255 F. 2d 876, 879 (2 Cir. 1958), cert. denied, 357 U. S. 937 (1958); *United States* v. *Pellegrino,* 273 F. 2d 570, 572 (2 Cir. 1960).

As for Carmick's opinions that Abrams is " . . . candid, blunt and completely honest," that the trial resulted in " . . . a gross miscarriage of justice" and that Abrams " . . . honestly gave with full sincerity a great deal of his time and effort to help Automatic Washer in its difficul-

ties," these are nothing more than conclusory statements and not evidence.

VIII. Whether Albert's Right Not to Testify was Violated by an Opening Statement Made by Knohl's Counsel; Whether the Court Should Have Granted a Mistrial

Albert asserts that his constitutional right not to take the stand and testify was violated by a statement made by Knohl's counsel that Albert would explain Knohl's acts and absolve him when Albert took the stand and testified. He claims that the court erred in denying his motion for a mistrial after this occurred.

The record shows, however, that Knohl's counsel had been led to believe that Albert would take the stand by what Albert and Albert's attorney had told him.

The trial commenced on September 4, 1964. The court permitted defense counsel to make their opening statements at the conclusion of the government's case. Thus, Mr. Singer, Knohl's counsel, made his opening statement on January 6, 1964. The substance of what he said was that Albert would take the stand and exonerate Knohl; that he would testify exactly how, when and where Automatic stock was delivered to Knohl. Singer argued that whatever Knohl did he did on the word of Albert.

Albert's counsel did not object and Singer continued with his statement. It was only after the following recess and before the jury was brought in that Albert's counsel objected and moved for a mistrial. The court denied the motion. Albert's counsel requested no instruction to the jury.

Albert did not testify, nor did Knohl. Before his summation, Singer requested permission to clarify the remarks made in the opening statement that Albert would exculpate

Knohl. The court permitted this reference to Albert's failure to take the stand for the limited purpose of allowing Singer to show why he could not exonerate Knohl in the manner he had promised in his opening, namely, through Albert's testimony.

The trial court fully instructed the jury that a defendant was not required to testify and that his failure to do so could not support any inference of guilt against him. The court said:

> "When several defendants are on trial together as in this case, each of them has this right not to testify even if one of the other defendants would like to call him as a witness. I instruct you specifically that you may not draw any inferences or presumptions of any sort favorable or unfavorable from the circumstance that Mr. Singer, Mr. Knohl's attorney, told you in his opening, that he would question Mr. Albert about certain transactions if Mr. Albert took the witness stand; and then, as you know, Mr. Albert ultimately saw fit not to take the witness stand and testify. You should not hold this against Mr. Albert since, as I have already explained to you, it is his right and it is the right of each of the defendants not to testify."

Because Albert was responsible for the reference he now objects to and because there was neither objection nor request for a limiting instruction, we think that Albert cannot be heard to complain that his right not to take the stand was violated by the comment of Knohl's counsel.

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We find no error whatsoever in the government's treatment of defense witness Robert Berk of which appellants complain. The briefs charge and counsel at oral argument suggested that Berk was threatened and coerced by the

government into changing his testimony. This charge is wholly without support. The record shows that quite the opposite was the fact. Berk voluntarily approached the government's attorneys and was told to consult with his own attorneys before any conversation concerning a change in his testimony could be discussed. In fact, the government itself contacted Berk's attorney and arranged an interview at which Berk was represented by two attorneys: Murray Spett and Stanley Schlesinger. The record also indicates that Berk denied having any fears of government retaliation as a result of adverse testimony and that not once did Berk himself or his attorney accuse the government of using pressure to induce a change in his testimony.

We note all these facts because we think we should point out that it is highly improper for counsel on appeal to make groundless charges against fellow members of the bar and officers of this court.

The proof of the appellants' guilt was overwhelming; the trial was fairly and scrupulously conducted. If anything the trial judge was too lenient in the latitude allowed defense counsel and too patient of repetitious arguments and maneuvers of defense counsel which had no merit and served only to lengthen unduly a trial which should not have taken so much time of the court and the jury. We find no error in this record and affirm the convictions.

Opinion of Tyler, *J.* Excluding Petitioners from Participating in Proceedings as to Defendant Albert's Mental Competency

August 14, 1964

Robert M. Morgenthau, U. S. Atty., by Michael F. Armstrong, Asst. U. S. Atty.

Gainsburg, Gottlieb, Levitan & Cole, New York City, for defendants Joseph Abrams and Richland Securities, Inc., Samuel Gottlieb, and Louis A. Tepper, of counsel.

Bernard D. Cahn, and Robert E. Smith, New York City, for defendant Sydney L. Albert.

TYLER, District Judge.

The purpose of this memorandum and order is to dispose of a number of procedural and other problems which confront counsel and the court as a result of certain post-verdict developments in this case.

To put these matters in reasonable focus, it may be helpful to recite some of the history of the proceedings, particularly those after the jury rendered a verdict late in the evening of February 16, 1964 after some five and one-half months of trial. Several days prior to the verdict date and on the morning after both the prosecution and all defendants had rested but before summations had begun, counsel for defendant Sydney L. Albert made an oral motion on the record pursuant to 18 U.S.C. § 4244 for a determination that that defendant was and had been throughout the trial incapable of fully understanding the nature of the proceedings and participating in his own defense. As counsel for defendant Albert were frank enough to concede, there was at that time no substantial evidence whatsoever available on this issue; thus, with the consent of counsel, the case proceeded to verdict. Defendants Joseph Abrams, Richland Securities, Inc. and Sydney Albert were convicted by the jury upon a number of counts in this indictment charging criminal violations of the Securities Act of 1933. Larry

Knohl, the fourth defendant standing trial, was acquitted of all charges against him.

Some weeks after the verdict, and at the invitation of the court, counsel for Albert submitted affidavits and other materials in support of his motion pursuant to Section 4244. Hearings and conferences were held, as a result of which this court entered an order committing Albert to the United States Medical Hospital in Springfield, Missouri for observation and report by government psychiatrists.

The reports of the latter were received by this court and counsel directly concerned in June of this year. Shortly after the receipt of these reports, it was agreed by counsel for the government and counsel for Albert that a full hearing on the Section 4244 issue would commence on August 12, 1964. Some days later, on July 21, 1964, however, counsel for Albert notified the court and the United States Attorney that Albert had suffered an acute coronary incident which required his hospitalization in Trenton, New Jersey on that day.

Accordingly, it has been necessary to appoint a doctor to examine Mr. Albert and to indefinitely adjourn the hearings on the Section 4244 question.

Prior to the advent of Mr. Albert's heart illness in July, this court had informally advised not only the prosecution but also all defense counsel that the sentencing of the defendants Abrams and Richland Securities, Inc., as well as that of Albert, would be deferred pending a resolution of Albert's incompetency motion. When it became apparent that those particular proceedings might be indefinitely delayed, counsel for the parties were invited by the court on July 28, 1964 to express their views in writing on the question as to whether or not sentencing of the latter two defendants could or should be deferred any longer.

Opinion of Tyler, J. Excluding Petitioners from Participating in Proceedings as to Defendant Albert's Mental Competency

With this brief and rather general history of the pertinent proceedings up to date, I will address myself first to the present physical condition of Mr. Albert, the prognosis of such condition for the foreseeable future and the related question of the disposition of the hearing date for his Section 4244 motion. Upon consideration of the report of one of Mr. Albert's doctors[1] and of the report of Dr. Alfred J. Schwager dated August 10, 1964 and rendered to the United States Attorney in accordance with an earlier order of this court, I determine that Mr. Albert reasonably can be expected to be a convalescent patient until on or about December 1, 1964 and thus not reasonably available for participation in any hearings until that date at the very earliest. Accordingly, there would appear to be no practical alternative but to adjourn the hearings on the issue of his competency *sine die* with the expectation that such hearings probably cannot be commenced, at the earliest, until December, 1964.[2]

This leads to the next question, whether or not under such circumstances it is appropriate and desirable to continue to defer the sentencing of defendants Joseph Abrams and Richland Securities, Inc. As is obvious to all concerned, it is at least theoretically possible that the two mentioned defendants will be at least indirectly affected or concerned about the outcome of the competency issue involving the defendant Albert. Counsel for defendants Abrams and Richland now urge, in response to the aforementioned invitation of this court, that sentencing of these two defendants should be deferred until the Albert hearings are completed, whenever that date may be. After careful

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[1] See report of Dr. Kurt Zeltmacher dated July 23, 1964.

[2] Implicit in this conclusion is this court's view, more about which will be discussed *infra*, that Mr. Albert should be present, if reasonably possible, at the hearings on the Section 4244 issue.

consideration of this view of the matter and in particular the letter of Samuel Gottlieb, Esq. dated August 5, 1964, I conclude that there are no legal or practical reasons to defer sentencing of these defendants for such a long and indeed indefinite period. It is true that neither court nor counsel have been able to uncover any authorities dealing squarely with the problem. Yet as I view the matter, even if it be assumed that the two defendants in question will be substantially affected by the outcome of the Albert Section 4244 hearings, there is no legal or practical impediment to their making such appropriate applications to fully protect their rights as they are advised when this court finally reaches a determination required by Section 4244.

More particularly, assuming that said two defendants in the future will be advised to contend that the claimed incompetence of another defendant so infected the trial as to create essential unfairness to them, there would then be open a number of procedural avenues to adequately raise such a point. See Rule 33, Federal Rules of Criminal Procedure; United States v. Norman Brown, et al., 335 F. 2d 170, August 5, 1964 (2d Cir.).

There is the additional consideration that no one presently is able to accurately forecast when Mr. Albert and his medical and legal representatives will be able to prepare for and participate in the hearing in question. Theoretically, further delays than that now contemplated may be necessary. Thus, for this reason alone, I find it difficult to conclude that any sound interest of even the defendants Abrams and Richland, not to mention those of the government, will be well served by a potentially indefinite and protracted deferment of sentencing.

Accordingly, it is directed that defendants Abrams and Richland appear for sentencing in Court Room 110 at 11:00 a. m. on September 14, 1964.

Opinion of Tyler, J. Excluding Petitioners from Participating in Proceedings as to Defendant Albert's Mental Competency

In view of this direction, it may be that certain other points raised by counsel for defendants Abrams and Richland lose their practical significance. Inasmuch as I cannot be sure of this, however, I will endeavor to deal with them specifically hereinafter.

Citing Johnson v. United States, 293 F. 2d 100 (5th Cir. 1961), counsel presses upon the court the argument that the Section 4244 hearing on behalf of Mr. Albert can appropriately be conducted in his absence. Both government counsel and the attorneys for Mr. Albert oppose this proposition. Further, as I understand it, Mr. Albert himself wishes to be present at this hearing. No doubt Abrams and Richland press this argument in good faith, but in my view the Johnson case presented circumstances different than those here present and thus is inapposite. Moreover, there exist other reported cases suggesting serious practical and legal problems if one of these proceedings is conducted in the absence of the party whose competence is in question. See, for example, Martin v. Settle, 192 F. Supp. 156 (W. D. Mo. 1961). It is directed, therefore, that if, as and when the Albert hearing goes forward, absent sound medical or other reasons not now known to the contrary, Mr. Albert should be present.

Counsel for Abrams and Richland also advance the argument that they should be entitled to directly participate in the proceeding or hearing on the issue of Albert's competence. As I understand them, they are in practical effect urging that they be permitted to examine and cross-examine witnesses and to offer such other evidence as they deem advisable. Conceding that these defendants have an interest in the proceeding and its outcome, I fail to see any reason in law or logic for permitting this kind of participation by others than the attorneys for the government and the de-

fendant Albert. This court has already directed that counsel for Abrams and Richland may have access to all medical reports and other material which tends to relate to the competency issue, with suitable safeguards, however, to protect insofar as possible the privacy of the defendant involved and his family. Further, of course, there would be no objection to a representative or representatives of the two defendants in question attending the hearing. All of this more than adequately protects the basic rights of the two defendants in question. To permit their counsel to take a more active role would unnecessarily complicate and prolong this already protracted litigation. Also, it should be observed that counsel for the defendant Albert flatly oppose this request by the attorneys for Richland and Abrams, and the government has voiced similar opposition. It is concluded, therefore, that the lawyers for Abrams and Richland should not be permitted to directly participate in the Section 4244 proceedings as they request.

It is so ordered in accordance with the foregoing; it will not be necessary for the parties herein to enter any further formal order.

Opinion of Tyler, *J.* as to Defendant Albert's Mental Competency

BERNARD D. CAHN, ESQ. and
ROBERT E. SMITH, ESQ. for the Movant.

HON. ROBERT M. MORGENTHAU, United States Attorney for the Southern District of New York by MICHAEL F. ARMSTRONG, Assistant United States Attorney for the Prosecution.

TYLER, *D.J.*

This is a motion for a retrospective finding that the defendant Sydney L. Albert was incompetent to stand trial within the meaning of 18 U.S.C. 4244. For reasons to be indicated hereinafter, this court concludes that Albert was competent during trial and all the preliminary proceedings —i.e. that he had a rational as well as factual understanding of the proceedings against him and that he then possessed the ability to consult with and assist his attorneys with a reasonable quantum of rational understanding.

Although some aspects of this motion and certain proceedings thereunder have been mentioned in an earlier decision of this court (see *United States* v. *Abrams, et al.*, 35 F.R.D. 529), it may be helpful to an understanding of the problems presented to briefly outline here the history of this application. Upon an indictment returned by a grand jury in this district in 1961, Albert and three other defendants went to trial before this court and a jury on September 4, 1963. On the night of February 16, 1964, the jury returned a verdict of guilty as to Albert and two other defendants upon certain counts in the indictment and of not guilty as to the fourth defendant. Previously, on February 5, 1964, and after all of the evidence was in and just before summations were to begin, the attorneys for Mr. Albert

made an oral motion for a determination of the competency issue pursuant to 18 U.S.C. 4244.[1]

After the verdict and on or about February 24, 1964, counsel for Albert filed a formal written motion pursuant to this statute. It was their principal contention, based upon certain episodes during the trial, the exact nature of which was not set forth, that Albert had been unable to factually and rationally assist them in the conduct of his defense. It was not their position then, nor is it now, that Albert at any time has been unable to understand the nature of the proceedings against him. See *Dusky* v. *United States,* 362 U.S. 402 (1960).

A week or so later and in March 1964, persons acting on behalf of Mr. Albert saw to it that he was examined by a reputable New York psychiatrist, Dr. Ralph S. Banay. A written report was prepared by Dr. Banay under date of March 11, 1964; this was submitted to this court a few days thereafter. Partly on the basis of this report, and upon a motion of the United States Attorney, this court signed an order committing defendant Albert to the United States Medical Hospital at Springfield, Missouri, for observation and report. The original commitment order provided that Albert would be at Springfield for thirty days. Upon the application of the acting warden and the staff psychiatrists at Springfield, however, this court extended the commitment so that the defendant was actually at Springfield from March 25 to on or about June 18, 1964.

After his release and return home, Albert was about to appear with his counsel for a formal evidentiary hearing on this issue when he suffered a coronary incident which

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[1] On February 5, decision thereon was necessarily reserved, with the consent of the moving counsel, because counsel then were in no position to advance specific grounds for this application.

required his hospitalization in Trenton, New Jersey. Thus, it was necessary for him to recuperate from this illness before it was deemed practicable for the hearings on the competency issue to proceed. Specifically, it was for this reason that evidentiary hearings on this matter were not held until January 12 and 13, 1965.

The principal evidence brought to bear at the two-day hearing consisted of the testimony of not only Dr. Banay but also three staff psychiatrists from the federal hospital at Springfield, plus, of course, the written reports of Dr. Banay and the staff at the federal facility. Although no useful purpose will be served in setting forth in clinical detail all of the evidence adduced, summarization of the principal findings and conclusions of the expert witnesses may be appropriate.

In his report of March 11, 1964, Dr. Banay set forth in some detail various information divulged to him by Mr. Albert and, to a certain extent perhaps, by relatives and his lawyers. His March 11th report, as I read it, gave no particularly precise clinical findings or supporting reasons but did make the following conclusions:

> "It is my opinion that (Albert) never operated on a mentally-sound foundation, and when his own trial came he was incompetent to assist his attorneys or participate adequate (sic) in his own defense."

Upon the witness stand, Dr. Banay gave his diagnosis that the defendant was and is "suffering a chronic form of mental disorder known as paranoid personality, and against this paranoid personality he developed a secondary condition, so-called manic reaction which is a defensive pattern . . ." In Dr. Banay's view, defendant is essentially unaware of his deep-seated pathology; further, in his view the defendant in all probability was suffering from paranoic delusions as early as 1954. Interestingly, as did the doctors

at Springfield, Dr. Banay found evidence that Albert's memory as to events in past years was generally excellent in contrast to his memory for comparatively recent events which was found to be faulty.[2] In sum, it was Dr. Banay's view that although the defendant understood the nature of the proceedings against him and, indeed, fully discerned the difference between right and wrong, he was incapable of relating such knowledge to his own circumstances and problems as presented by the trial.

Dr. Wayne H. Glotfelty, chief staff psychiatrist at Springfield, also testified at the hearing. It was he who prepared an interim report on Mr. Albert during April, 1964. He also participated in the staff interview of Mr. Albert on June 2, 1964 and the follow-up staff conference at which a final report on this patient was prepared. It was the conclusion of Dr. Glotfelty that defendant has and has had a personality disturbance with some attendant feelings of depression. He disagreed, however, with Dr. Banay's primary finding of deep-seated paranoia. He agreed with Dr. Banay upon the secondary findings of symptoms of hypomanic activity—i.e. a manic reaction. In conclusion, Dr. Glotfelty was definite in his view that Albert was competent—that he was capable of rational cooperation with his attorneys in the preparation of his defense during trial.

Another staff psychiatrist at Springfield, Dr. David A. Rothstein, testified at the hearing. Essentially, he concurred with Dr. Banay in a finding of some personality disturbance with attendant symptoms of depression and manic reaction. His difference with the views of Dr. Banay was one of degree. He did not conclude that there was any compelling information or evidence to support a finding of deep-seated pathology. As Dr. Rothstein put it, if it could be said that

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[2] Generally, the crucial events cast up by the indictment fell within the years 1956, 1957 and 1958.

the total picture of the patient contained some colorations or shadings of paranoia, this was largely because the patient was endeavoring to erect defense to his feelings of depression. Dr. Rothstein participated in the June 2 staff interview of Albert, and it was he who wrote the final staff report. Parenthetically, mention should be made of the efforts of counsel to question Dr. Rothstein's use of the descriptive phrase in his final report of "borderline case" in reference to this patient. Upon the witness stand, he explained that he did not use this phrase to indicate that this was a close case on the strict medical-legal issue of competency. Rather, it was his intention to indicate by this phraseology his opinion that the defendant closely approaches the dviding line between legal and criminal behavior patterns—i.e. that Albert's case presented a close question of culpability which was for the court and of course not for the medical profession to decide.

The final expert witness who testified at the hearing was Dr. Gustave J. Weyland, another staff psychiatrist at Springfield who was in charge of the ward to which Albert was assigned during his stay at that institution. Dr. Weyland dealt with the defendant substantially upon an informal basis in the sense that he did not render any formal reports or file any written diagnoses or opinions. He was in substantial agreement with all the other doctors that this patient presented a pattern of some mental disturbance. Nevertheless, he was firm in his opinion that the patient was not and is not a psychotic. Based upon his rather frequent, albeit informal, meetings and talks with the defendant, he was of the opinion that Albert was one of the more intelligent, quiet and controlled individuals residing in a ward wherein were lodged the more mature and self-controlled patients at the Springfield medical facility.

Opinion of Tyler, J. as to Defendant Albert's Mental Competency

On the basis of the available evidence I determine that the defendant in question is and has been emotionally disturbed to a degree discernible by at least qualified specialists, particularly since in or about March, 1964. Nevertheless, there is little doubt but that Sydney L. Albert prior to and throughout the trial was capable of understanding the nature of the proceedings against him and, more important, then possessed the ability to assist with rational understanding in the conduct of his defense.

Conceding that such determinations diverge in substantial part from the conclusions expressed by Dr. Banay, I might observe that this court has been armed with certain significant advantages which were not available to either Dr. Banay or the other doctors. Chief among these was the fact that I observed Mr. Albert daily for a period of almost six months. Specifically, there were not only the daily observations during the lengthy trial but also contacts in pretrial conferences including, on May 10, 13 and 14, 1963 an evidentiary hearing before this court in connection with a pre-trial motion by the defendant. Albert testified at this hearing and was cross-examined. He was on the stand for more than half a court day. His demeanor was unexceptional, and his testimony was lucid and logical.

During the trial itself, this court observed Albert day after day conferring with his counsel, examining documents and listening intently to the proceedings. Moreover, there were occasions; as the record reflects, when this court had occasion to ask questions of Albert. At not time during the presence of the jury and the judge did this defendant ever exhibit the slightest indication or inclination to breach the decorum of the proceedings.

Mention should be made of an episode, apparently relied on here by defense counsel, giving rise to a request that

Albert be admonished for failure during the trial to heed the directions and advice of his counsel. Albert seemingly responded to the obvious and familiar advice to listen to the recommendations of his professional representatives. Certainly no other mention of the problem was made thereafter in the remaining weeks of trial. Thus, I find it difficult if not impossible to assume that the largely unspecified difficulties of rational communication between client and counsel were anything unusual, at least in the sense that they exceeded the kind of problem which many experienced lawyers encounter all too frequently—particularly in dealings with intelligent, forceful, business-executive clients.

Granting that no judge can usurp unto himself the qualifications of a physician, I believe it nonetheless so that a trial judge's prolonged observations are entitled to substantial weight where, as here, (1) there are differences of opinion among the specialist witnesses; (2) the particular issue presented is as largely legal as it is medical in content; and (3) previous courtroom experience, both as a lawyer and judge, is available to the trier of the issue. With these considerations in mind, I evaluate the testimony of defendant's physician to be not wholly supported by the specific findings and reasons which he advanced either at the hearing or in his written report of March 11, 1964. Moreover, as all psychiatrists and many laymen are aware, symptoms of paranoia vary in degree. The evidence here suggests that the symptoms exhibited by this defendant were comparatively mild—i.e. he was not and has not become a psychotic as that term is very commonly used in the medical profession today. Further, if I were to assume that the defendant from September, 1963 to February, 1964 was a psychotic, I do not believe that this in itself would necessarily require a finding that Albert could not

rationally cooperate with and assist his defense counsel. " . . . [T]he pages of history are dotted with paranoiacs, . . . ", many of whom have managed to get along in the world.[3] In short, I find no persuasive evidence to support the conclusion that Albert's mental disturbance, even if at a psychotic stage, was sufficient to impair his realistic and rational cooperation with defense counsel.

Accordingly, it is my conclusion that during the time of and immediately prior to trial, Sydney Albert had sufficient ability to consult with his lawyers with a reasonable degree of rational understanding, not only of the general but indeed of the specific particulars of the proceedings against him; moreover, I conclude that there is little doubt but that he had a rational and sufficient ability to consult with counsel respecting a meaningful defense in this case. This motion is in all respects denied; it is directed in this connection that the within opinion be sealed, subject to further orders of this court.

So ordered.

February 2, 1965.

/s/ H. R. Tyler, Jr.
U.S.D.J.

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[3] See Dr. Karl A. Menninger, *The Human Mind* (3rd Rev. Ed. 1945), pp. 86 and 87.

Opinion of Tyler, D.J. Denying Defendants Abrams and Richland Securities, Inc.'s Post Verdict Motion

TYLER, *D.J.*

The post-verdict motions of defendants Abrams and Richland Securities, Inc. are disposed of as follows:

1. The renewed motion to dismiss the twenty-eight severed counts is once again denied as being premature, without prejudice to its renewal after said defendants are sentenced by this court.

2. The motion for a new trial on the grounds of "newly discovered evidence" (consisting largely of matters set forth in the Chamberlin and Carmick affidavits) does not present material pointing toward an acquittal in the event of a new trial. Moreover, during the course of the trial the issues touched upon in this particular motion were very much out in the open; however, there was then no apparent interest on the part of said defendants to call Carmick as a witness or recall the witness Chamberlin in order to delve deeper into these matters. Thus, this motion is denied. See, generally, *United States* v. *Pellegrino,* 273 F. 2d 570, 2d Cir., 1960.

3. All other motions of said defendants incorporated in their papers filed on or about June 26, 1964 are lacking in merit and thus are denied.

So ordered.

H. R. TYLER, JR.
U.S.D.J.

July 27, 1964

APPENDIX OF STATUTES AND REGULATIONS

United States Constitution—Fifth Amendment

No person shall * * * be deprived of life, liberty or property, without due process of law.

Statute of Limitations

18 U.S.C. § 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Immunity Statute

15 U.S.C. § 77v

(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. May 27, 1933, c. 38, Title I, § 22, 48 Stat. 86; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 10, 1954, c. 667, Title I, § 11, 68 Stat. 686.

Statutory Provisions Applicable to Sale of Unregistered Stock

15 U.S.C. § 77e. Prohibitions relating to interstate commerce and the mails

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

§ 77x. Penalties

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both. May 27, 1933, c. 38, Title I, § 24, 48 Stat. 87.)

§ 77d. Exempted transactions

The provisions of section 77e of this title shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not in-

volving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions taking place prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter and transactions in a security as to which a registration statement has been filed taking place prior to the expiration of forty days after the effective date of such registration statement or prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later (excluding in the computation of such forty days any time during which a stop order issued under section 77h of this title is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

§ 77b. Definitions

When used in this subchapter, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or par-

ticipation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell", "offer for sale", or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. The terms defined in this paragraph and the term "offer to buy" as used in subsection (c) of section 77e of this title shall not include preliminary negotiations or agreements between an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer) and any underwriter or among underwriters who are or are to be in privity of contract with an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer). Any security given or delivered with or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been offered and sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another

security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until some future date, shall not be deemed to be an offer or sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security.

(4) The term "issuer" means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering.

(5) The term "Commission" means the Securities and Exchange Commission.

(6) The term "Territory" means Puerto Rico, Canal Zone, the Virgin Islands, and the insular possessions of the United States.

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 77f of this title, and includes any amendment thereto and any report, document, or memorandum filed as part of such statement or incorporated therein by reference.

(9) The term "write" or "written" shall include printed, lithographed, or any means of graphic communication.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security; except that (a) a communication sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of section 77j of this title) shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of section 77j of this title at the time of such communication was sent or given to the person to whom the communication was made,

and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 77j of this title may be obtained and, in addition, does no more than identify the security, state the price thereof, state by whom orders will be executed, and contain such other information as the Commission, by rules or regulations deemed necessary or appropriate in the public interest and for the protection of investors, and subject to such terms and conditions as may be prescribed therein, may permit.

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person. May 27, 1933, c. 38, Title I, § 2, 48 Stat. 74; June 6, 1934, c. 404, §§ 201, 210, 48 Stat. 905, 908; Aug. 10, 1954, c. 667, Title I, §§ 1-4, 68 Stat. 683; June 25, 1959, Pub.L. 86-70, § 12(a), 73 Stat. 143; July 12, 1960, Pub.L. 86-624, § 7(a), 74 Stat. 412.

S.E.C. Regulations

Definition, for Purposes of Section 5, of "Sale," "Offer," "Offer to Sell," and "Offer for Sale"

Reg. § 230.133. (a) For purposes only of Section 5 of the Act, no "sale," "offer," "offer to sell," or "offer for sale" shall be deemed to be involved so far as the stockholders of a corporation are concerned where, pursuant to statutory provisions in the State of incorporation or provisions contained in the certificate of incorporation, there is submitted to the vote of such stockholders a plan or agreement for a statutory merger or consolidation or reclassification of securities, or a proposal for the transfer of assets of such corporation to another person in consideration of the issuance of securities of such other person or voting stock of a corporation which is in control, as defined in Section 368(c) of the Internal Revenue Code of 1954, of such other person, under such circumstances that the vote of a required favorable majority (1) will operate to authorize the proposed transaction so far as concerns the corporation whose stockholders are voting (except for the taking of action by the directors of the corporation involved and for compliance with such statutory provisions as the filing of the plan or agreement with the appropriate State authority), and (2) will bind all stockholders of such corporation except to the extent that dissenting stockholders may be entitled, under statutory provisions or provisions contained in the certificate of incorporation, to receive the appraised or fair value of their holdings.

[Purchaser of Securities as Underwriter]

(b) Any person who purchases securities of the issuer from security holders of a constituent corporation with a view to, or offers or sells such securities for such security

holders in connection with, a distribution thereof pursuant to any contract or arrangement, made in connection with any transaction specified in paragraph (a), with the issuer or with any affiliate of the issuer, or with any person who in connection with such transaction is acting as an underwriter of such securities, shall be deemed to be an underwriter of such securities within the meaning of section 2(11) of the Act. This paragraph does not refer to arrangements limited to provision for the matching and combination of fractional interests in securities into whole interests, or the purchase and sale of such fractional interests, among security holders of the constituent corporation and to the sale on behalf of, and as agent for, such security holders of such number of fractional or whole interests as may be necessary to adjust for any remaining fractional interests after such matching.

[Constituent Corporation as Underwriter]

(c) Any constituent corporation, or any person who is an affiliate of a constituent corporation at the time any transaction specified in paragraph (a) is submitted to a vote of the stockholders of such corporation, who acquires securities of the issuer in connection with such transaction with a view to the distribution thereof shall be deemed to be an underwriter of such securities within the meaning of section 2(11) of the Act. A transfer by a constituent corporation to its security holders of securities of the issuer upon a complete or partial liquidation shall not be deemed a distribution for the purpose of this paragraph.

(d) Notwithstanding the provisions of paragraph (c) a person specified therein shall not be deemed to be an underwriter nor to be engaged in a distribution with respect to securities acquired in any transaction specified in paragraph (a) which are sold by him in brokers' transactions

within the meaning of section 4(4) of the Act, in accordance with the conditions and subject to the limitations specified in paragraph (e) hereof, if such person

(1) does not directly or indirectly solicit or arrange for the solicitation of orders to buy in anticipation of or in connection with such brokers' transactions;

(2) makes no payment in connection with the execution of such brokers' transactions to any person other than the broker; and

(3) limits such brokers' transactions to a sale or series of sales which together with all other sales of securities of the same class by such person or on his behalf within the preceding six months will not exceed the following:

(A) if the security is traded only otherwise than on a securities exchange, approximately one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions, or

(B) if the security is admitted to trading on a securities exchange, the lesser of approximately (i) one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions or (ii) the largest aggregate reported volume of trading on securities exchanges during any one week within the four calendar weeks preceding the receipt of such order.

[Broker's Transactions]

(e) For the purposes of paragraph (d) of this rule

(1) the term "broker's transactions" in section 4(4) of the Act shall be deemed to include transactions by a broker acting as agent for the account of the seller where (a) the broker performs no more than the usual and customary

broker's functions, (b) the broker does no more than execute an order or orders to sell as a broker and receives no more than the usual or customary broker's commissions, (c) the broker does not solicit or arrange for the solicitation of orders to buy in anticipation of or in connection with such transactions and (d) the broker is not aware of any circumstances indicating that his principal is failing to comply with the provisions of paragraph (d) hereof;

(2) the term "solicitation of such orders" in section 4(4) of the Act shall be deemed to include the solicitation of an order to buy a security, but shall not be deemed to include the solicitation of an order to sell a security;

(3) where within the previous 60 days a dealer has made a written bid for a security or a written solicitation of an offer to sell such security, the term "solicitation" in section 4(4) shall not be deemed to include an inquiry regarding the dealer's bid or solicitation.

[Definitions]

(f) For the purposes of this rule, the term "constituent corporation" means any corporation, other than the issuer, which is a party to any transaction specified in paragraph (a). The term "affiliate" means a person controlling, controlled by or under common control with a specified person.

[Adopted in Release No. 33-3420, August 2, 1951, 16 F. R. 8577; amended by Release No. 33-3522, October 26, 1954, 19 F. R. 7129; Release No. 33-4115, July 16, 1959, 24 F. R. 5900; and Release No. 33-4761 (¶ 77,197), effective March 8, 1965, 30 F. R. 2022.]

Definition of Certain Terms Used in Section 4(4)

Reg. § 230.154. (a) The term "brokers' transactions" in Section 4(4) of the Act shall be deemed to include trans-

actions by a broker acting as agent for the account of any person controlling, controlled by, or under common control with, the issuer of the securities which are the subject of the transactions where—

(1) The broker performs no more than the usual and customary broker's function,

(2) The broker does no more than execute an order or orders to sell as a broker and receives no more than the usual or customary broker's commission, and the broker's principal, to the knowledge of the broker, makes no payment in connection with the execution of such transaction to any other person,

(3) Neither the broker, nor to his knowledge his principal, solicits or arranges for the solicitation of orders to buy in anticipation of or in connection with such transactions, and

(4) The broker is not aware of circumstances indicating that his principal is an underwriter in respect of the securities or that the transactions are part of a distribution of securities on behalf of his principal.

(b) For the purpose of paragraph (a) of this section, the term "distribution" shall not apply to transactions involving an amount not substantial in relation to the number of shares or units of the security outstanding and the aggregate volume of trading in such security. Without limiting the generality of the foregoing, the term "distribution" shall not be deemed to include a sale or series of sales of securities which, together with all other sales of securities of the same class by or on behalf of the same person within the preceding period of six months, will not exceed the following: (1) if the security is traded only otherwise than on a securities exchange, approximately

one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions or (2) if the security is admitted to trading on a securities exchange the lesser of approximately (i) one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions or (ii) the largest aggregate reported volume of trading on securities exchanges during any one week within the four calendar weeks preceding the receipt of such order.

(c) The term "solicitation of such orders" in Section 4(4) of the Act shall be deemed to include the solicitation of an order to buy a security, but shall not be deemed to include the solicitation of an order to sell a security.

(d) Where within the previous 60 days a dealer has made a written bid for a security or a written solicitation of an offer to sell such security, the term "solicitation" in Section 4(4) shall not be deemed to include an inquiry regarding the dealer's bid or solicitation.

[Adopted in Release No. 33-3421, August 2, 1951, 16 F. R. 8578; amended by Release No. 33-3525, December 22, 1954, 19 F. R. 9375; and Release No. 33-4761 (¶ 77,197), effective March 8, 1965, 30 F. R. 2022.]

Business Records Rule

28 U.S.C. § 1732. Record made in regular course of business; photographic copies

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily

identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of course. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence. As amended Aug. 28, 1951, c. 351, §§ 1, 3, 65 Stat. 206; Aug. 30, 1961, Pub. L. 87-183, 75 Stat. 413.

Statutes Pertaining to the Issue of Mental Health

18 U.S.C. § 4241. Examination and transfer to hospital

A board of examiners for each Federal penal and correctional institution shall consist of (1) a medical officer appointed by the warden or superintendent of the institution; (2) a medical officer appointed by the Attorney General; and (3) a competent expert in mental diseases appointed by the Surgeon General of the United States Public Health Service.

Such board shall examine any inmate of the institution alleged to be insane or of unsound mind or otherwise defective and report their findings and the facts on which they are based to the Attorney General.

The Attorney General, upon receiving such report, may direct the warden or superintendent or other official having custody of the prisoner to cause such prisoner to be removed to the United States hospital for defective delinquents or to any other institution authorized by law to receive insane persons charged with or convicted of offenses against the United States, there to be kept, until, in the judgment of the superintendent of said hospital, the prisoner shall be restored to sanity or health or until the maximum sentence, without deduction for good time or commutation of sentence, shall have been served. June 25, 1948, c. 645, 62 Stat. 855.

§ 4242. Retransfer upon recovery

An inmate of the United States hospital for defective delinquents whose sanity or health is restored prior to the expiration of his sentence may be retransferred to any penal or correctional institution designated by the Attorney General, there to remain pursuant to the original sentence, com-

puting the time of his detention or confinement in said hospital as part of the term of his imprisonment. June 25, 1948, c. 645, 62 Stat. 855.

§ 4243. Delivery to state authorities on expiration of sentence

The superintendent of the United States hospital for defective delinquents shall notify the proper authorities of the State, Territory, District, or Possession where any insane prisoner has his legal residence, or, if this cannot be ascertained, the proper authorities of the State, Territory, District, or Possession from which he was committed, of the date of expiration of sentence of any prisoner who, in the judgment of such superintendent, is still insane or a menace to the public. Such superintendent shall cause such prisoner to be delivered into the custody of the proper authorities of such State, Territory, District or Possession. June 25, 1948, c. 645, 62 Stat. 855.

§ 4244. Mental incompetency after arrest and before trial

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental

condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury. Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686.

§ 4245. Mental incompetency undisclosed at trial

Whenever the Director of the Bureau of Prisons shall certify that a person convicted of an offense against the United States has been examined by the board of examiners referred to in title 18, United States Code, section 4241, and that there is probable cause to believe that such person was mentally incompetent at the time of his trial, provided the issue of mental competency was not raised and determined before or during said trial, the Attorney General shall transmit the report of the board of examiners and the certificate of the Director of the Bureau of

Prisons to the clerk of the district court wherein the conviction was had. Whereupon the court shall hold a hearing to determine the mental competency of the accused in accordance with the provisions of section 4244 above, and with all the powers therein granted. In such hearing the certificate of the Director of the Bureau of Prisons shall be prima facie evidence of the facts and conclusions certified therein. If the court shall find that the accused was mentally incompetent at the time of his trial, the court shall vacate the judgment of conviction and grant a new trial. Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686.

§ 4246. Procedure upon finding of mental incompetency

Whenever the trial court shall determine in accordance with sections 4244 and 4245 of this title that an accused is or was mentally incompetent, the court may commit the accused to the custody of the Attorney General or his authorized representative, until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law. And if the court after hearing as provided in the preceding sections 4244 and 4245 shall determine that the conditions specified in the following section 4247 exist, the commitment shall be governed by section 4248 as herein provided. Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686.

§ 4247. Alternate procedure on expiration of sentence

Whenever the Director of the Bureau of Prisons shall certify that a prisoner whose sentence is about to expire has been examined by the board of examiners referred to in title 18, United States Code, section 4241, and that in the judgment of the Director and the board of examiners the prisoner is insane or mentally incompetent, and that if released he will probably endanger the safety of the

officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the prisoner are not otherwise available, the Attorney General shall transmit the certificate to the clerk of the court for the district in which the prisoner is confined. Whereupon the court shall cause the prisoner to be examined by a qualified psychiatrist designated by the court and one selected by the prisoner, and shall, after notice, hold a hearing to determine whether the conditions specified above exist. At such hearing the designated psychiatrist or psychiatrists shall submit his or their reports, and the report of the board of examiners and other institutional records relating to the prisoner's mental condition shall be admissible in evidence. All of the psychiatrists and members of the board who have examined the prisoner may be called as witnesses, and be available for further questioning by the court and cross-examination by the prisoner or on behalf of the Government. At such hearing the court may in its discretion call any other witnesses for the prisoner. If upon such hearing the court shall determine that the conditions specified above exist, the court may commit the prisoner to the custody of the Attorney General, or his authorized representative. Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686.